

NORTH CAROLINA
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TABLE OF CONTENTS

Judges of the Court of Appeals	v
Superior Court Judges	vi
District Court Judges	viii
Attorney General	xii
District Attorneys	xiii
Public Defenders	xiv
Table of Cases Reported	xv
Cases Reported Without Published Opinion	xix
General Statutes Cited and Construed	xxii
Rules of Civil Procedure Cited and Construed	xxvi
Constitution of United States Cited and Construed	xxvi
Constitution of North Carolina Cited and Construed	xxvii
Rules of Appellate Procedure Cited and Construed	xxvii
Industrial Commission Rules Cited and Construed	xxvii
Disposition of Petitions for Discretionary Review	xxviii
Opinions of the Court of Appeals	1-789
Amendments to Rules of Appellate Procedure	793
Analytical Index	829
Word and Phrase Index	867

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CASES REPORTED

PAGE	PAGE
A & C Mobile Homes, Strickland v. 768	C. J. Kern Contractors, Square D Co. v. 30
Ace-Hi, Inc. v. Dept. of Transportation 214	Clark, Acosta v. 111
Acosta v. Clark 111	Coastal Production v. Goodson Farms 221
Alexander Co. Dept. of Soc. Serv., Yow v. 174	Coleman v. Edwards 206
Alliance Mutual Ins. Co. v. N. Y. Central Ins. Co. 140	Colony Co., Colony Hill Condominium I Assoc. v. 390
Auman, Gaito v. 21	Colony Hill Condominium I Assoc. v. Colony Co. 390
Bare v. Wayne Poultry Co. 88	Cook, Lambe-Young, Inc. v. 588
Barham, In re Appeal of 236	Crumbley v. Crumbley 143
Barnaby v. Boardman 299	Covel, S. v. 490
Bates, S. v. 477	Craver, S. v. 555
Beam, S. v. 181	DHL Corp., Smith v. 124
Bethea v. McDonald 566	Davis v. Mobilift Equipment Co. 621
Blanton v. Sisk 70	Davis, S. v. 449
Blythe Industries, Inc., Broadway v. 435	Dept. of Transportation, Ace-Hi, Inc. v. 214
Boardman, Barnaby v. 299	DesMarais v. Dimmette 134
Bomer v. Campbell 137	Dimmette, DesMarais v. 134
Boyles v. Boyles 415	Dow, S. v. 82
Briggs v. Morgan 57	Eagle's Nest, Inc. v. Malt 397
Broadway v. Blythe Industries, Inc. 435	Eastern Roofing and Aluminum Co. v. Brock 431
Brock, Eastern Roofing and Aluminum Co. v. 431	Edmondson, S. v. 426
Brooks, Comr. of Labor v. Butler 681	Edwards, Coleman v. 206
Brower v. Brower 131	Edwards, S. v. 317
Bunn v. N. C. State University 699	E. F. Hutton & Co., Skinner v. 517
Burch, S. v. 444	Electric Membership Corp., Sola Basic Industries v. 737
Butler, Brooks, Comr. of Labor v. 681	Estrada v. Jaques 627
Campbell, Boomer v. 137	Evans v. Cimarron Apartments 772
Campbell v. City of Greensboro 252	Fireman's Fund Ins. Co. v. Williams Oil Co. 484
Carolina Telephone, Tyson v. 593	First-Citizens Bank v. Kornegay 264
Cator v. Cator 719	Floyd, Hardy v. 608
Chamberlin v. Chamberlin 474	Forbes Homes, Inc. v. Trimpi 614
Childress v. Forsyth County Hospital Auth. 281	Ford, S. v. 244
Cimarron Apartments, Evans v. 772	Forsyth County Hospital Auth., Childress v. 281
Cimarron Apartments, Starkey v. 772	France v. Winn-Dixie Supermarket 492
City of Greensboro, Campbell v. 252	Friberg, Sloop v. 690
City of Greensboro v. Reserve Insurance Co. 651	

CASES REPORTED

PAGE	PAGE
Gaito v. Auman	21
General Electric Co., Mebane v.	752
General Motors Corp., Short v.	454
G.H.G., Inc., Winston Realty Co. v.	374
Gillis v. Whitley's Discount Auto Sales	270
Goodson Farms, Coastal Production v.	221
Grier, S. v.	40
Guilford Mills, Inc., Millikan v.	705
Hardy v. Floyd	608
Harris v. Walden	616
Henderson v. Manpower	408
Henderson v. Traditional Log Homes	303
Hickory Construction Co., Servomation Corp. v.	309
Hicks, S. v.	611
Hinton v. Hinton	665
Hobson, S. v.	619
Holcomb v. Holcomb	471
Hopkins, S. v.	530
Howard, S. v.	487
Howell v. Treece	322
Hyde v. Taylor	523
In re Appeal of Barham	236
In re Huggins v. Precision Concrete Forming	571
In re Johnson	383
In re Petition of Jonas	116
In re Superior Court Order	63
In re Watson	120
In re Webb	345
Integon Corp., Phillips v.	440
Jackson, S. v.	782
Johnson, In re	383
Johnson v. N. C. Dept. of Transportation	784
Jonas, In re Petition of	116
Jones, S. v.	467
Jaques, Estrada v.	627
Knott v. Washington Housing Authority	95
Kornegay, First-Citizens Bank v.	264
Kornegay, Smith-Douglas v.	264
Kornegay, S. v.	579
Lambe-Young, Inc. v. Cook	588
Lassiter, S. v.	731
Lee v. State Farm Fire and Casualty Co.	575
Lester, S. v.	757
Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.	742
McDaniel, Marcoin, Inc. v.	498
McDaniel v. N. C. Mutual Life Ins. Co.	480
McDonald, Bethea v.	566
McDowell v. Smathers Super Market	775
McGinnis, S. v.	421
McLamb, S. v.	712
McLean, Maxton Housing Authority v.	550
McNair, S. v.	331
McRae, S. v.	779
Maintenance Service v. Construction Co.	49
Malt, Eagle's Nest, Inc. v.	398
Manpower, Henderson v.	408
Marcoin, Inc. v. McDaniel	498
Mason, Robins & Weill v.	537
Mather v. Mather	106
Maxton Housing Authority v. McLean	550
Mebane v. General Electric Co.	752
Millikan v. Guilford Mills, Inc.	705
Minor v. Minor	76
Mobilift Equipment Co., Davis v.	621
Monroe, S. v.	462
Morgan, Briggs v.	57
Morgan v. Town of Hertford	725
Murphrey v. Winslow	10
N. C. Mutual Life Ins. Co., McDaniel v.	480
N. C. State University, Bunn v.	699
N. Y. Central Ins. Co., Alliance Mutual Ins. Co. v.	140

CASES REPORTED

	PAGE		PAGE
O'Boyle Tank Lines,		Sparks v. Sailors' Snug Harbor . . .	596
Southern Railway Co. v.	1	Spears, S. v.	747
O'Briant v. O'Briant	360	Spencer v. Spencer	159
Pennsylvania Nat. Mut. Cas.		Square D Co. v. C. J. Kern	
Ins. Co., Lumbermens		Contractors	30
Mut. Cas. Co. v.	742	Starkey v. Cimarron Apartments . .	772
Phillips v. Integon Corp.	440	S. v. Bates	477
Plyler Construction, Tri City		S. v. Beam	181
Building Components v.	605	S. v. Burch	444
Pollock v. Reeves Bros., Inc.	199	S. v. Covell	490
Precision Concrete Forming,		S. v. Craver	555
In re Huggins v.	571	S. v. Davis	449
Rawls, S. v.	230	S. v. Dow	82
Reeves Bros., Inc., Pollock v.	199	S. v. Edmondson	426
Register v. Administrative		S. v. Edwards	317
Office of the Courts	763	S. v. Ford	244
Reserve Insurance Co., City		S. v. Grier	40
of Greensboro v.	651	S. v. Hicks	611
Richardson, S. v.	509	S. v. Hobson	619
Rickey Office Equipment,		S. v. Hopkins	530
Superior Tile v.	258	S. v. Howard	487
Robins & Weill v. Mason	537	S. v. Jackson	782
Roger Baker and Assoc.,		S. v. Jones	467
Schuman v.	313	S. v. Kornegay	579
Rutherford, S. v.	674	S. v. Lassiter	731
Sailors' Snug Harbor, Sparks v. . . .	596	S. v. Lester	757
Santos, Walker v.	623	S. v. McGinnis	421
Schuman v. Roger Baker		S. v. McLamb	712
and Assoc.	313	S. v. McNair	331
Servomation Corp. v. Hickory		S. v. McRae	779
Construction Co.	309	S. v. Monroe	462
Short v. General Motors Corp.	454	S. v. Rawls	230
Simmons v. Tuttle	101	S. v. Richardson	509
Sisk, Blanton v.	70	S. v. Rutherford	674
Skinner v. E. F. Hutton & Co.	517	S. v. Smith	293
Sloop v. Friberg	690	S. v. Snyder	335
Smathers Super Market,		S. v. Spears	747
McDowell v.	775	S. v. Tarrant	449
Smith v. DHL Corp.	124	S. v. Triplett	341
Smith-Douglas v. Kornegay	264	S. v. Vick	338
Smith, S. v.	293	S. v. Walker	403
Snyder, S. v.	335	S. v. Wheeler	191
Sola Basic Industries v. Electric		S. v. Woodruff	561
Membership Corp.	737	S. v. Woods	584
Southern Railway Co. v.		State Farm Fire and Casualty	
O'Boyle Tank Lines	1	Co., Lee v.	575
		Stepp, Groce, Pinales &	
		Cosgrove v. Thompson	147
		Stilwell v. Walden	543

CASES REPORTED

	PAGE		PAGE
Storie, Watson v.	327	Walker v. Santos	623
Strickland v. A & C		Walker, S. v.	403
Mobile Homes	768	Wallace v. Wallace	458
Summerlin, Town of		Washington Housing Authority,	
Kenansville v.	601	Knott v.	95
Superior Court Order, In re	63	Watson, In re	120
Superior Tile v. Rickey		Watson v. Storie	327
Office Equipment	258	Wayne Poultry Co., Bare v.	88
Tarrant, S. v.	449	Waynick Construction v. York	287
Taylor, Hyde v.	523	Webb, In re	345
Thompson, Stepp, Groce,		Wheeler, S. v.	191
Pinales & Cosgrove v.	147	Whitley's Discount Auto	
Thompson v. Thompson	147	Sales, Gillis v.	270
Town of Hertford, Morgan v.	725	Wilfong v. Wilkins, Com'r of	
Town of Kenansville		Motor Vehicles	127
v. Summerlin	601	Wilkins, Com'r of Motor	
Traditional Log Homes,		Vehicles, Wilfong v.	127
Henderson v.	303	Williams Oil Co., Fireman's	
Treece, Howell v.	322	Fund Ins. Co. v.	484
Tri City Building Components		Winn-Dixie Supermarket,	
v. Plyler Construction	605	France v.	492
Trimpi, Forbes Homes, Inc. v.	614	Winslow, Murphrey v.	10
Triplett, S. v.	341	Winston Realty Co.	
Tuttle, Simmons v.	101	v. G.H.G., Inc.	374
Tyson v. Carolina Telephone	593	Woodruff, S. v.	561
Vick, S. v.	338	Woods, S. v.	584
Walden, Harris v.	616	York, Waynick	
Walden, Stilwell v.	543	Construction v.	287
		Yow v. Alexander Co. Dept.	
		of Soc. Serv.	174

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
Allen, S. v.	495	Elmwood v. Elmwood	787
Alston, S. v.	787	Ennis v. Ennis	626
Appalachian Stove v. Dunn	146		
Atkinson, S. v.	146	Fesperman v. Fesperman	344
Autry, S. v.	495	Fewell, S. v.	788
		Finnigan Corp., Brent v.	494
Bagwell, Wilson v.	789	Fowler, S. v.	495
Baker, S. v.	787	Fowler, S. v.	788
Barrett v. Barrett	494	Freeman v. Hunter &	
Bates, S. v.	787	Walden Co.	787
Beebee v. Kemco of NC	494	Freeman, S. v.	788
Belk, In re	146		
Bielinski v. Bielinski	146	Garrison, S. v.	788
Bodenhamer v. Town		Gerber v. Gerber	787
of Kure Beach	494	Gilbert, S. v.	788
Bordeaux, S. v.	344	Gooding, S. v.	788
Bradley, Dawes v.	787	Gray, S. v.	495
Brent v. Finnigan Corp.	494	Green v. Sarji	494
Britt v. C. A. Floyd & Sons	494	Greentree Acceptance	
Brown, S. v.	495	v. Sellers Ent.	494
Browning, Northwestern Bank v.	787	Griffin v. Housing Projects, Inc.	787
Burleson v. Mitchell	494		
C. A. Floyd & Sons,		Hall, S. v.	495
Britt v.	494	Hamby v. Corriher Ford Tractor ..	494
Carter & Spicer, S. v.	788	Harrell, S. v.	626
Carver, S. v.	344	Harris, S. v.	495
Cauthen, S. v.	495	Hickory Springs MFG, Murphy v.	344
Chapman, S. v.	788	Hinson, State, ex rel. v.	789
Cline v. Cline	787	Hodges v. Kelly	344
Coca-Cola Co., Eller v.	787	Holbrook, S. v.	495
Coleman, S. v.	495	Holton, Realty World-	
Cook, S. v.	495	Templeton v.	626
Corriher Ford Tractor,		Housing Projects, Inc.,	
Hamby v.	497	Griffin v.	787
Crandall, S. v.	626	Hubbard, S. v.	788
Curtis v. Dept. Transportation	344	Hunter & Walden Co.,	
		Freeman v.	787
Davis v. Powell	344	Huntley v. Rutherford Hospital	494
Davis, S. v.	495		
Davis, S. v.	788	Ingram, Insurance Services v.	787
Davis v. Taylor	494	In re Baucom v. Union Co.	494
Dawes v. Bradley	787	In re Belk	146
Deep River Washing, Mosley v.	344	In re Foreclosure of	
Dept. Transportation, Curtis v.	344	Deed of Tann	787
Dunn, Appalachian Stove v.	146	In re Wilkinson v. National	
		Spinning Co.	787
E. F. Hutton & Co. v. Sexton	146	Insurance Services v. Ingram	787
Eller v. Coca-Cola Co.	787	Ireland v. Ireland	344

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
Jacobs, S. v.	626	Riley, S. v.	626
Jamerson, S. v.	788	Roberts, S. v.	789
Johnson, S. v.	495	Rosenberg, S. v.	789
Johnson, S. v.	788	Rutherford Hospital, Huntley v.	494
Joines, S. v.	146		
		Sarji, Green v.	494
Kelley, S. v.	495	Sellers Ent., Greentree	
Kelly, Hodges v.	344	Acceptance v.	494
Kemco of NC, Beebee v.	494	Sexton, E. F. Hutton & Co. v.	146
Knight, S. v.	626	Shearin, Young v.	497
Koutroulakis v. Koutroulakis	494	Shiver, S. v.	496
		Showell, S. v.	789
Lamb v. Southern Railway Co.	146	Simes, S. v.	789
Lawla, S. v.	788	Simons, S. v.	496
Lee, S. v.	344	Smith, S. v.	496
Leslie, S. v.	788	Southern Railway Co., Lamb v.	146
Locklear, S. v.	496	Speer v. Speer	495
Long v. Wilkins	787	Spence, S. v.	789
Lundy v. Wake Co. Bd. of Educ.	494	S.R.M. Realty v. Webster	146
		Stallings, S. v.	496
McDougald, McLean v.	494	S. v. Allen	495
McKinney, S. v.	496	S. v. Alston	787
McLean v. McDougald	494	S. v. Atkinson	146
		S. v. Autry	495
Mason, S. v.	788	S. v. Baker	787
Michael, S. v.	789	S. v. Bates	787
Miller & Brown, S. v.	496	S. v. Bordeaux	344
Mills, S. v.	496	S. v. Brown	495
Mitchell, Burleson v.	494	S. v. Carter & Spicer	788
Mitchell, S. v.	496	S. v. Carver	344
Moore, S. v.	496	S. v. Cauthen	495
Morrison v. Morrison	344	S. v. Chapman	788
Mosley v. Deep River Washing	344	S. v. Coleman	495
Murphy v. Hickory Springs MFG ..	344	S. v. Cook	495
		S. v. Crandall	626
National Spinning Co.,		S. v. Davis	495
In re Wilkinson v.	787	S. v. Davis	788
Nobles, S. v.	789	S. v. Fewell	788
Northwestern Bank v. Browning ..	787	S. v. Fowler	495
		S. v. Fowler	788
Palmer, S. v.	496	S. v. Freeman	788
Parker, S. v.	496	S. v. Garrison	788
Pemberton, S. v.	146	S. v. Gilbert	788
Powell, Davis v.	344	S. v. Gooding	788
Pugh, S. v.	626	S. v. Gray	495
		S. v. Hall	495
Raiford, S. v.	496	S. v. Harrell	626
Realty World-Templeton		S. v. Harris	495
v. Holton	626	S. v. Holbrook	495

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
S. v. Hubbard	788	S. v. Swinson	496
S. v. Jacobs	626	S. v. Taylor	789
S. v. Jamerson	788	S. v. Terry	496
S. v. Johnson	495	S. v. Warren	789
S. v. Johnson	788	S. v. Williams	344
S. v. Joines	146	State, ex rel. v. Hinson	789
S. v. Kelley	495	Stinson, S. v.	789
S. v. Knight	626	Swinson, S. v.	496
S. v. Lawla	788		
S. v. Lee	344	Taliaferro v. Wright	344
S. v. Leslie	788	Tann, In re Foreclosure	
S. v. Locklear	496	of Deed of	787
S. v. McKinney	496	Taylor, Davis v.	494
S. v. Mason	788	Taylor, S. v.	789
S. v. Michael	789	Terry, S. v.	496
S. v. Miller & Brown	496	Town of Kure Beach,	
S. v. Mills	496	Bodenhamer v.	494
S. v. Mitchell	496	Travenol Laboratories,	
S. v. Moore	496	Troutman v.	497
S. v. Nobles	789	Traynham, Wilson v.	497
S. v. Palmer	496	Troutman v. Travenol	
S. v. Parker	496	Laboratories	497
S. v. Pemberton	146		
S. v. Pugh	626	Union Co., In re Baucom v.	494
S. v. Raiford	496		
S. v. Riley	626	Wake Co. Bd. of Educ.,	
S. v. Roberts	789	Lundy v.	494
S. v. Rosenberg	789	Warren, S. v.	789
S. v. Shiver	496	Webster, S.R.M. Realty v.	146
S. v. Showell	789	Wilkins, Long v.	787
S. v. Simes	789	Williams, S. v.	344
S. v. Simons	496	Wilson v. Bagwell	789
S. v. Smith	496	Wilson v. Traynham	497
S. v. Spence	789	Wright, Taliaferro v.	344
S. v. Stallings	496		
S. v. Stinson	789	Young v. Shearin	497

GENERAL STATUTES CITED AND CONSTRUED

G.S.

1-15(c)	Walker v. Santos, 623
1-27.4(5)a	Sola Basic Industries v. Electric Membership Corp., 737
1-50(5)	Square D Co. v. C. J. Kern Contractors, 30
	Colony Hill Condominium I Assoc. v. Colony Co., 390
	Davis v. Mobilift Equipment Co., 621
	Starkey v. Cimarron Apartments;
	Evans v. Cimarron Apartments, 772
1-50(6)	Colony Hill Condominium I Assoc. v. Colony Co., 390
	Davis v. Mobilift Equipment Co., 621
1-52(16)	Gaito v. Auman, 21
1-53(4)	Walker v. Santos, 623
1-75.4(5)a	Sola Basic Industries v. Electric Membership Corp., 737
1-75.8(3)	Chamberlin v. Chamberlin, 474
1-78	DesMarais v. Dimmette, 134
1-253	Coleman v. Edwards, 206
	City of Greensboro v. Reserve Insurance Co., 651
1-254	Coleman v. Edwards, 206
1-255	Coleman v. Edwards, 206
1-339.25(a) and (c)	Bomer v. Campbell, 137
1A-1	See Rules of Appellate Procedure infra
1B-7	Holcomb v. Holcomb, 471
5-1(4)	Mather v. Mather, 106
5A-11(a)(3)	Mather v. Mather, 106
5A-16(b)	Mather v. Mather, 106
5A-22(a)	Bethea v. McDonald, 566
5A-23	Bethea v. McDonald, 566
6-21.1	McDaniel v. N. C. Mutual Life Ins. Co., 480
6-21.2	Coastal Production v. Goodson Farms, 221
6-21.2(1)	Coastal Production v. Goodson Farms, 221
6-21.2(5)	Blanton v. Sisk, 70
	Coastal Production v. Goodson Farms, 221
7A-49.3	State v. Edwards, 317

GENERAL STATUTES CITED AND CONSTRUED

G.S.

7A-244	Sloop v. Friberg, 690
7A-271	State v. Triplett, 341
7A-289.32	In re Webb, 345
	In re Johnson, 383
7A-517(21)	In re Webb, 345
	In re Johnson, 383
8-51	Lambe-Young, Inc. v. Cook, 588
8-83(2), (9)	Stilwell v. Walden, 543
14-2.3	State v. Triplett, 341
14-3(b)	State v. Triplett, 341
14-27.3	State v. Lester, 757
14-65	State v. Hicks, 611
14-71.1	State v. Craver, 555
14-100	State v. Hopkins, 530
14-106 and 107	State v. Hopkins, 530
14-126	State v. Bates, 477
14-318.2(a)	State v. Woods, 584
15A-249	State v. Edwards, 317
15A-251	State v. Edwards, 317
15A-606(a)	State v. Beam, 181
15A-701 <i>et seq.</i>	State v. Jones, 467
15A-701(b)	State v. Jones, 467
15A-703	State v. Smith, 293
15A-951	State v. Ford, 244
15A-978(b)(1)	State v. Craver, 555
15A-1052(c)	State v. Rutherford, 674
15A-1061	State v. Rutherford, 674
15A-1334	State v. McRae, 779
15A-1340.4	State v. Kornegay, 579
15A-1340.4(a)	State v. McRae, 779
	State v. Spears, 747

GENERAL STATUTES CITED AND CONSTRUED

G.S.

15A-1340.4(a)(1)(j)	State v. Jackson, 782
15A-1340.4(a)(2)(j)	State v. Kornegay, 579
15A-1414(a)	State v. Craver, 555
15A-1414(c)	State v. Craver, 555
15A-1448(a)(4)	State v. Craver, 555
20-4.01(49)	State v. Craver, 555
20-106	State v. Craver, 555
20-279.13	Wilfong v. Wilkins, Com'r of Motor Vehicles, 127
25A-40(b)	Eastern Roofing and Aluminum Co. v. Brock, 431
42-7	Coleman v. Edwards, 206
42-8	Murphrey v. Winslow, 10
42-37.1(c)	Maxton Housing Authority v. McLean, 550
45-21.36	Hyde v. Taylor, 523
45-21.38	Blanton v. Sisk, 70
	Hyde v. Taylor, 523
47-20	Schuman v. Roger Baker and Assoc., 313
47B-2(a)	Harris v. Walden, 616
49-2	State v. Hobson, 619
50-13.3	Mather v. Mather, 106
50-13.4	Sloop v. Friberg, 690
50-13.4(b)	Sloop v. Friberg, 690
50-13.5(i)	Sloop v. Friberg, 690
50-13.7(a)	O'Briant v. O'Briant, 360
50-16.5(a)	Sloop v. Friberg, 690
50-20(b)(2)	Crumbley v. Crumbley, 143
50-20(c)(12)	Hinton v. Hinton, 665
50A-1 <i>et seq.</i>	Sloop v. Friberg, 690
Chapter 58	Eastern Roofing and Aluminum Co. v. Brock, 431
	Phillips v. Integon Corp., 440
58-39.4(c)	City of Greensboro v. Reserve Insurance Co., 651
58-155.48(a)(1)	City of Greensboro v. Reserve Insurance Co., 651
58-155.52(a)	City of Greensboro v. Reserve Insurance Co., 651

GENERAL STATUTES CITED AND CONSTRUED

G.S.

59(e)	Hardy v. Floyd, 608
Chapter 75	Strickland v. A & C Mobile Homes, 768
75-1.1	Eastern Roofing and Aluminum Co. v. Brock, 431 Winston Realty Co. v. G.H.G., Inc., 374
75-5	Phillips v. Integon Corp., 440
90-21.13	Estrada v. Jaques, 627
90-21.13(a)(1) and (2)	Estrada v. Jaques, 627
95-47.6(2) and (9)	Winston Realty Co. v. G.H.G., Inc., 374
96-14(1)	Bunn v. N. C. State University, 699
97-6.1	Henderson v. Traditional Log Homes, 303
97-31(24)	Sparks v. Sailors' Snug Harbor, 596
105-134	Sloop v. Friberg, 690
105-141(b)(6)	Sloop v. Friberg, 690
105-253	In re Petition of Jonas, 116
105-278.6	In re Appeal of Barham, 236
105-375	Howell v. Treece, 322
136-89.58	Ace-Hi, Inc. v. Dept. of Transportation, 214
136-89.58(5)	Ace-Hi, Inc. v. Dept. of Transportation, 214
160A-48(e)	Campbell v. City of Greensboro, 252
160A-312	Morgan v. Town of Hertford, 725
160A-331 through 338	Morgan v. Town of Hertford, 725

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.

6(d)	Gillis v. Whitley's Discount Auto Sales, 270
7(d)	Stilwell v. Walden, 543
10(b)(2)	State v. Woodruff, 561
12(b)(6)	Forbes Homes, Inc. v. Trimpi, 614
12(f)	Estrada v. Jaques, 627
12(h)(3)	Sloop v. Friberg, 690
15(c)	Estrada v. Jaques, 627
17	Southern Railway Co. v. O'Boyle Tank Lines, 1
26(b)(1)	Campbell v. City of Greensboro, 252
32(a)(3)	Stilwell v. Walden, 543
41(b)	Simmons v. Tuttle, 101
52	Waynick Construction v. York, 287
52(a)(1) and (2)	Brooks, Comr. of Labor v. Butler, 681
56	Harris v. Walden, 616
56(c)	Tri City Building Components v. Plyler Construction, 605
56(e)	Gillis v. Whitley's Discount Auto Sales, 270
	Hyde v. Taylor, 523
59(e)	Hardy v. Floyd, 608
60(b)(1)	Simmons v. Tuttle, 101
61	Sloop v. Friberg, 690
65(d)	Spencer v. Spencer, 159

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

IV Amendment

In re Superior Court Order, 63

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. II, § 24

Campbell v. City of Greensboro, 252

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.

9(a)	Sloop v. Friberg, 690
10(b)	Brooks, Comr. of Labor v. Butler, 681
10(b)(2)	State v. Woodruff, 561
25(b)(5)	Brooks, Comr. of Labor v. Butler, 681
25(c)	Brooks, Comr. of Labor v. Butler, 681

INDUSTRIAL COMMISSION RULES CITED AND CONSTRUED

Rule No.

XXI(2)	Mebane v. General Electric Co., 752
--------	-------------------------------------

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
Bare v. Wayne Poultry Co.	70 N.C. App. 88	Denied, 312 N.C. 796
Barnaby v. Boardman	70 N.C. App. 299	Allowed, 312 N.C. 621
Brooks, Comr. of Labor v. Butler	70 N.C. App. 681	Denied, 313 N.C. 327 Appeal Dismissed
Bunn v. N. C. State University	70 N.C. App. 699	Denied, 313 N.C. 173
Campbell v. City of Greensboro	70 N.C. App. 252	Denied, 312 N.C. 492 Appeal Dismissed
Chamberlin v. Chamberlin	70 N.C. App. 474	Denied, 312 N.C. 621
Childress v. Forsyth County Hospital Auth.	70 N.C. App. 281	Denied, 312 N.C. 796
Coastal Production v. Goodson Farms	70 N.C. App. 221	Denied, 312 N.C. 621
Colony Hill Condominium I Assoc. v. Colony Co.	70 N.C. App. 390	Denied, 312 N.C. 796
Davis v. Mobilift Equipment Co.	70 N.C. App. 621	Denied, 313 N.C. 328 Appeal Dismissed
E. F. Hutton & Co. v. Sexton	70 N.C. App. 146	Denied, 313 N.C. 328
Eller v. Coca-Cola Co.	70 N.C. App. 787	Denied, 313 N.C. 173 Appeal Dismissed
Fesperman v. Fesperman	70 N.C. App. 344	Denied, 312 N.C. 82
France v. Winn-Dixie Supermarket	70 N.C. App. 492	Denied, 313 N.C. 329
Freeman v. Hunter & Walden Co.	70 N.C. App. 787	Denied, 313 N.C. 507
Harris v. Walden	70 N.C. App. 616	Allowed, 313 N.C. 173
Henderson v. Traditional Log Homes	70 N.C. App. 303	Denied, 312 N.C. 622
Howell v. Treece	70 N.C. App. 322	Denied, 312 N.C. 797 Appeal Dismissed
In re Appeal of Barham	70 N.C. App. 236	Denied, 312 N.C. 622
In re Superior Court Order	70 N.C. App. 63	Allowed, 312 N.C. 622
In re Watson	70 N.C. App. 120	Denied, 313 N.C. 330
Ireland v. Ireland	70 N.C. App. 344	Denied, 313 N.C. 330
Lambe-Young, Inc. v. Cook	70 N.C. App. 588	Denied, 313 N.C. 330

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
McDaniel v. N.C. Mutual Life Ins. Co.	70 N.C. App. 480	Denied, 312 N.C. 84
McDowell v. Smathers Super Market	70 N.C. App. 775	Denied, 312 N.C. 797
McLean v. McDougald	70 N.C. App. 494	Denied, 312 N.C. 797
McMillan v. Seaboard Coastline R.R.	68 N.C. App. 162	Denied, 312 N.C. 541
Marcoin, Inc. v. McDaniel	70 N.C. App. 498	Denied, 312 N.C. 797
Maxton Housing Authority v. McLean	70 N.C. App. 550	Denied as to additional issues, 312 N.C. 623
Millikan v. Guilford Mills, Inc.	70 N.C. App. 705	Denied, 312 N.C. 798
Minor v. Minor	70 N.C. App. 76	Denied, 312 N.C. 495
Murphrey v. Winslow	70 N.C. App. 10	Denied as to additional issues, 312 N.C. 495
Northwestern Bank v. Browning	70 N.C. App. 787	Denied, 312 N.C. 798 Appeal Dismissed
O'Briant v. O'Briant	70 N.C. App. 360	Denied as to additional issues, 312 N.C. 623
Pollock v. Reeves Bros., Inc.	70 N.C. App. 199	Appeal dismissal denied, 313 N.C. 604
Robins & Weill v. Mason	70 N.C. App. 537	Denied, 312 N.C. 495
Short v. General Motors Corp.	70 N.C. App. 454	Denied, 312 N.C. 623
Skinner v. E. F. Hutton & Co.	70 N.C. App. 517	Allowed as to additional issues, 312 N.C. 623
S.R.M. Realty v. Webster	70 N.C. App. 146	Denied, 312 N.C. 496
Starkey v. Cimarron Apartments; Evans v. Cimarron Apartments	70 N.C. App. 772	Denied, 312 N.C. 798
State v. Allen	70 N.C. App. 495	Denied, 313 N.C. 174 Appeal Dismissed
State v. Atkinson	70 N.C. App. 146	Denied, 312 N.C. 798
State v. Bates	70 N.C. App. 477	Allowed, 313 N.C. 331
State v. Bates	70 N.C. App. 787	Allowed, 313 N.C. 331
State v. Beam	70 N.C. App. 181	Denied, 312 N.C. 496
State v. Bordeaux	70 N.C. App. 344	Denied, 312 N.C. 496
State v. Cauthen	70 N.C. App. 495	Denied, 312 N.C. 496

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
State v. Davis	70 N.C. App. 495	Denied, 313 N.C. 511 Appeal Dismissed
State v. Davis	70 N.C. App. 788	Denied, 313 N.C. 332
State v. Edmondson	70 N.C. App. 426	Allowed, 312 N.C. 799
State v. Gooding	70 N.C. App. 788	Denied, 313 N.C. 606
State v. Hicks	70 N.C. App. 611	Denied, 312 N.C. 87
State v. Holbrook	70 N.C. App. 495	Denied, 313 N.C. 333
State v. Johnson	70 N.C. App. 495	Denied, 312 N.C. 799
State v. Joines	70 N.C. App. 146	Denied, 313 N.C. 512
State v. Kornegay	70 N.C. App. 579	Denied, 313 N.C. 175
State v. Lassiter	70 N.C. App. 731	Denied, 313 N.C. 512
State v. Lee	70 N.C. App. 344	Denied, 312 N.C. 800
State v. Lester	70 N.C. App. 757	Allowed, 313 N.C. 175
State v. McRae	70 N.C. App. 779	Denied, 313 N.C. 175
State v. Nixon	61 N.C. App. 348	Denied, 313 N.C. 175
State v. Palmer	70 N.C. App. 496	Denied, 312 N.C. 88
State v. Richardson	70 N.C. App. 509	Allowed, 313 N.C. 175
State v. Roberts	70 N.C. App. 789	Denied, 313 N.C. 335
State v. Rutherford	70 N.C. App. 674	Denied, 313 N.C. 335
State v. Showell	70 N.C. App. 789	Denied, 312 N.C. 800
State v. Swinson	70 N.C. App. 496	Denied, 312 N.C. 89
State v. Triplett	70 N.C. App. 341	Denied, 312 N.C. 497
State v. Warren	70 N.C. App. 789	Denied, 312 N.C. 800
State v. Wheeler	70 N.C. App. 191	Denied, 312 N.C. 624
State v. Woodruff	70 N.C. App. 561	Denied, 312 N.C. 624
Strickland v. A & C Mobile Homes	70 N.C. App. 768	Denied, 313 N.C. 336
Superior Tile v. Rickey Office Equipment	70 N.C. App. 258	Denied, 313 N.C. 336
Wallace v. Wallace	70 N.C. App. 458	Denied, 313 N.C. 336
Waynick Construction v. York	70 N.C. App. 287	Denied, 312 N.C. 624
Wilfong v. Wilkins, Com'r of Motor Vehicles	70 N.C. App. 127	Denied, 312 N.C. 498

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
Wilson v. Traynham	70 N.C. App. 497	Denied, 313 N.C. 337
Winston Realty Co. v. G.H.G., Inc.	70 N.C. App. 374	Allowed as to additional issues, 312 N.C. 498
Yow v. Alexander Co. Dept. of Soc. Serv.	70 N.C. App. 174	Denied, 312 N.C. 625

CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

SOUTHERN RAILWAY COMPANY, ERNEST L. WILLIAMS, STEPHEN C.
CLOER AND RICHARD D. USSERY v. O'BOYLE TANK LINES, INC.

No. 8317SC326

(Filed 21 August 1984)

1. Railroads § 5— railway employees injured in near-miss—negligence of truck driver—sufficiency of evidence

In an action to recover for injuries sustained by railway company employees when they jumped from a moving train because they mistakenly thought that the train was going to collide with a tanker truck owned by defendant and driven by one of defendant's employees, the trial court erred in directing verdict for defendant since the evidence was sufficient to permit a jury to find that defendant's driver was negligent in executing a turn-around of his truck on the train crossing and in failing to move his truck from the crossing until the train was less than 50 feet away.

2. Evidence §§ 1, 2— regulations of administrative agencies—no proper submission into evidence—no judicial notice

The trial court was not required to take judicial notice of administrative regulations promulgated by the N. C. Public Utilities Commission and the U. S. Department of Transportation, since neither of the promulgating agencies was subject to the N. C. Administrative Procedure Act; the court was therefore required to take judicial notice of their regulations only if submitted in accordance with certain procedures designed to insure their accuracy; and there was nothing in the record or the transcript indicating that the regulations in question were properly submitted into evidence.

3. Assignments § 1; Rules of Civil Procedure § 17— personal injury—rights of injured party not assignable—real party in interest

Where employees of plaintiff railway company were injured when they jumped from a moving train because they mistakenly thought that it was go-

Southern Railway Co. v. O'Boyle Tank Lines

ing to collide with a truck owned by defendant and driven by one of defendant's employees, plaintiff company compensated its employees for their injuries and related expenses, and plaintiff employees assigned their causes of action to plaintiff company in writing, plaintiff company was not the real party in interest since the purported assignment of plaintiff employees' rights was contrary to public policy and ineffective; however, pursuant to G.S. 1A-1, Rule 17, the trial court could properly direct that the plaintiff employees be made parties to the action "as of the date of filing of the first complaint," thus overcoming defendant's argument that the statute of limitations had run with respect to such plaintiffs.

Judge HEDRICK concurring in part and dissenting in part.

APPEAL by plaintiffs from *Hairston, Judge*. Judgment entered 2 November 1982 in Superior Court, SURRY County. Heard in the Court of Appeals 16 February 1984.

This is a civil action wherein plaintiff Southern Railway seeks damages from defendant for injuries to the individual plaintiffs allegedly resulting from the negligence of one of defendant's employees.

The essential facts are as follows:

The three individual plaintiffs, employees of plaintiff Southern Railway Company (Southern), were injured when they jumped from a moving train. They jumped because they mistakenly thought that the train was going to collide with a petroleum tanker truck that was owned by defendant and driven by one of defendant's employees. There was no collision. This incident occurred in the Surry County town of Pilot Mountain on 5 October 1978. Southern compensated its employees for their injuries and related expenses.

On 1 October 1981, Southern filed a complaint in superior court charging defendant's driver with negligence resulting in the injuries to plaintiffs Cloer and Williams. Alternatively, in the event that Southern was found negligent in the operation of the train, the complaint sought contribution from defendant of one-half of the damages to the injured employees based on defendant's concurring negligence. The damages sought by Southern were based on the amounts it paid to Cloer and Williams as compensation for their injuries and related expenses. On 2 October 1981, Southern filed a complaint in district court based on the injuries sustained by plaintiff Ussery and the compensation paid to

Southern Railway Co. v. O'Boyle Tank Lines

him. The district court action was similar in all essential respects to the action filed the day before in superior court. These complaints were filed five and four days, respectively, before the expiration date of the three year statute of limitations. Prior to the initiation of these actions, the individual plaintiffs had assigned their causes of action to Southern in writing. The assignments were alleged in the complaints.

By consent of the parties on 11 August 1982, the district court action was removed to superior court and consolidated with the actions pending in superior court. The matter came on for a jury trial at the 1 November 1982 session.

At the close of plaintiffs' evidence, defendant moved for a directed verdict pursuant to G.S. 1A-1, Rule 50(a). There were two distinct grounds for the motion which the court considered separately. First, defendant contended that, under North Carolina common law, Southern was not the real party in interest and that the causes of action were not assignable. During argument the court ordered that the individual plaintiffs be made parties to the action under G.S. 1A-1, Rule 17(a), "as of the date of the first complaint." The court then declined to direct the verdict or to dismiss the case on these grounds. The other grounds for defendant's motion were (1) that Southern had failed to show defendant was negligent, and (2) that, even if defendant was negligent, the contributory negligence of Ussery, the engineer on the train, was the sole proximate cause of the injuries.

The court denied the motion. Thereafter, defendant presented no evidence but renewed its motion for a directed verdict on the same grounds asserted earlier. After argument by counsel, the court granted the motion and plaintiffs appealed.

Bell and White, by W. Thomas White, for plaintiff appellants.

Hutchins, Tyndall, Doughton and Moore, by Thomas W. Moore, Jr., for defendant appellee.

EAGLES, Judge.

I

Plaintiffs assign as error the trial court's grant of defendant's motion for a directed verdict. Plaintiff contends that the motion

Southern Railway Co. v. O'Boyle Tank Lines

was improperly granted because the evidence was legally sufficient to show negligence on the part of defendant and the issue should have been submitted to the jury. We agree that the motion was improperly granted as to the individual plaintiffs.

It is well established that the purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence to support a verdict for the plaintiff and to submit the contested issue to a jury. *E.g.*, *Manganello v. Permastone*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982). Where a motion for directed verdict is made at the close of the evidence, the court must consider the evidence in the light most favorable to the party opposing the motion and give that party the benefit of every reasonable inference. *E.g.*, *Cook v. Export Leaf Tobacco Co.*, 50 N.C. App. 89, 272 S.E. 2d 883 (1980), *rev. denied*, 302 N.C. 396, 279 S.E. 2d 350 (1981). Any contradictions, conflicts or inconsistencies in the evidence must be resolved in favor of the opposing party. *Hart v. Warren*, 46 N.C. App. 672, 266 S.E. 2d 53, *rev. denied*, 301 N.C. 89, --- S.E. 2d --- (1980). The court should deny the motion if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case. *Wallace v. Evans*, *supra*. See generally, 11 N.C. Index 3d, *Rules of Civil Procedure* § 50 (1978).

Defendant's motion for directed verdict at the close of the evidence was based on the same grounds as its earlier motion at the close of plaintiffs' case. The trial court was not specific in directing the verdict but granted the motion "equally on all basis [sic] enumerated." Those bases included defendant's contention that Southern was not the real party in interest. Since the court had already ordered the addition of the individual plaintiffs as parties to the action, the real party in interest argument was not an appropriate basis for a directed verdict against the individual plaintiffs. The real party in interest issue as it applies to Southern is considered below.

[1] We first address whether the evidence is sufficient to allow a jury to find negligence on the part of defendant and whether that negligence resulted in the injuries to plaintiffs. Only plaintiffs presented evidence. That evidence tends to show the following:

On the morning of 5 October 1978, a train owned by Southern was travelling west through Pilot Mountain on a track also owned

Southern Railway Co. v. O'Boyle Tank Lines

by Southern. The individual plaintiffs were all employed by Southern at the time and all were riding in the engine. Plaintiff Ussery was the engineer operating the train. The weather was clear.

Academy Street is a street in Pilot Mountain that runs north-south through the town. The railroad track runs east to west on a downhill grade of approximately 1.5% (1.5 feet down for every 100 feet of track). Academy Street and the track intersect perpendicularly at a grade crossing. The track approaching the Academy Street crossing from the east, the direction of the train's approach, is straight for approximately two and a half miles and the view of the Academy Street crossing is unobstructed. Approximately four tenths of a mile east of the Academy Street crossing is another crossing.

As the train proceeded through the town, its brake was engaged and it was moving at approximately 20 m.p.h. As the train approached the first crossing, the engineer sounded the horn. Just beyond this crossing, he observed a white object coming across the track from the north at the Academy Street crossing. Between two and three tenths of a mile away, he identified the object as a tanker truck that was backing over the track. He alerted plaintiffs Cloer and Williams, began sounding a "cow call"—a series of short bursts—on the train's horn, and engaged the emergency braking system. The train's bell was ringing and its headlight was on. When it appeared to plaintiff Ussery that the truck would not move off the track and that the train would not stop before reaching the crossing, he jumped from the moving train and directed the other employees to follow. At this point the train was moving at 15 to 17 m.p.h. and was about 150 feet from the crossing. Plaintiffs Cloer and Williams jumped from the train approximately 50 to 100 feet before the crossing. Both of them saw the tanker begin to move as they jumped but it was still on the track. The truck moved off the track and there was no collision. The unmanned train proceeded through the crossing and stopped with its fourth car across the crossing.

John Adams, the driver of defendant's truck, testified for the plaintiffs. On the morning of the accident, he was in the course of delivering gas to Armtex Mills in Pilot Mountain and was traveling east on Pine Street toward Academy Street. Pine Street

Southern Railway Co. v. O'Boyle Tank Lines

parallels the railroad tracks and intersects Academy Street approximately 68 feet north of the railroad crossing. The truck and trailer that Adams was driving was 46 feet long. The rear of the trailer did not extend beyond the rear wheels. The tanker was full of liquefied petroleum gas. The gas was flammable and the tanker was marked with warnings to that effect. In order to make his delivery, Adams was required to turn the truck and trailer around and head west on Pine Street. He executed the turn-around at the intersection of Academy and Pine Streets by turning north on Academy Street, backing south on Academy, across the Pine Street intersection toward the tracks, and turning west onto Pine Street again. Although he heard no whistle, horn, or bell, Adams saw the train's headlight and was aware of its approach. He watched his rearview mirror closely while backing and testified that he did not get close to the track.

After completing his turn-around, Adams proceeded to Arm-tex Mills to make his delivery. He had parked the truck and was pumping the fuel from it into the Armtex tanks when he was approached by Ussery. Ussery testified that the following exchange took place:

Ussery: "Mr., you almost got some people hurt up here."

Adams: "Yes, I know, I hate it."

At trial, Adams acknowledged that Ussery had spoken to him but denied saying "[Y]es, I know, I hate it." He indicated that he was not aware of the near-accident until Ussery spoke to him. After this initial conversation, Adams and Ussery walked back toward the crossing. Adams pointed out to Ussery and the other Southern employees some tire prints that he claimed were made by his truck. Adams estimated that the tire prints stopped 12 feet short of the tracks.

Our research has disclosed no case on point with the present one—a railroad crossing accident not involving a collision. There are many cases from our state and other jurisdictions where a collision did occur. The duties and responsibilities of the respective parties in those situations are well established and are relevant here.

Southern Railway Co. v. O'Boyle Tank Lines

When approaching a railroad crossing, the motorist and train operator are under a reciprocal duty of exercising due care to avoid a crossing accident. *Johnson v. Southern Ry. Co.*, 255 N.C. 386, 121 S.E. 2d 580 (1961). Though the motorist and the train have equal rights to use a crossing, the motorist must yield the right of way to the train. *Price v. Seaboard Airline Ry. Co.*, 274 N.C. 32, 161 S.E. 2d 590 (1968). When a motorist is aware that he is approaching a crossing, he must exercise due care to protect himself and proceed in such a way that he is able to stop and avoid a collision with an oncoming train. *Id.* A train approaching a crossing is under a duty to warn of its approach by ringing its bell and blowing its horn. *Neal v. Booth*, 287 N.C. 237, 214 S.E. 2d 36 (1975). Where the evidence in a case shows a failure by either party to use due care in such a situation, that negligence may be held to be the sole proximate cause of the accident. *Brown v. Ry. Co. and Phillips v. Ry. Co.*, 276 N.C. 398, 172 S.E. 2d 502 (1970); *Owens v. Norfolk and Western Ry. Co.*, 258 N.C. 92, 128 S.E. 2d 4 (1962). Where the evidence tends to show negligence on the part of both parties, a jury may find contributory negligence on the part of the motorist, *Neal v. Booth, supra*; *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 293 S.E. 2d 235 (1982), or that the negligence of both parties concurred to produce the accident. *Brown v. Ry. Co. and Phillips v. Ry. Co., supra*. The doctrine of last clear chance ordinarily operates in such situations to permit a shifting of liability to the train operator when the evidence shows that he had an opportunity, in the exercise of due care, to avoid a collision, but negligently failed to do so. *E.g., Irby v. Southern Ry. Co.*, 246 N.C. 384, 98 S.E. 2d 349 (1957); *Clark v. Ry. Co.*, 109 N.C. 430, 14 S.E. 43 (1891); *Thomas Bros. Oil Co. v. Southern Ry. Co.*, 54 N.C. App. 423, 283 S.E. 2d 794 (1981). However, the doctrine would not apply on these unique facts because (1) there was no collision and (2) the train operator sustained the injury. Rather, assuming sufficient evidence, ordinary contributory negligence could operate as a bar to plaintiffs' recovery here. See Prosser, *Law of Torts* § 66 (1971). See generally, 11 N.C. Index 3d, *Railroads*, § 5-7.1 (1978 and Supp. 1983).

With these principles in mind, the evidence is clearly sufficient to permit a jury to find that defendant's driver was negligent. See *Johnson v. Southern Ry. Co., supra*. "Where con-

Southern Railway Co. v. O'Boyle Tank Lines

flicting inferences can be drawn from the evidence, there is no contributory negligence as a matter of law." *Cooper v. Town of Southern Pines*, *supra* at 175, 293 S.E. 2d at 237. "It is well settled that where opposing inferences are permissible from plaintiff's evidence, a directed verdict on the grounds of contributory negligence as a matter of law should be denied." [Citations omitted.] *Thomas Bros. Oil Co. v. Southern Ry. Co.*, *supra* at 427, 283 S.E. 2d at 796. In our opinion, the evidence in this case permits several interpretations while compelling none. A jury question was therefore presented and a directed verdict was improper.

[2] Plaintiffs next contended that the trial court erred in refusing to take judicial notice of two administrative regulations: one promulgated by the North Carolina Public Utilities Commission and the other by the United States Department of Transportation. A court must take judicial notice of important administrative regulations having the force of law. *Mann v. Henderson*, 261 N.C. 338, 134 S.E. 2d 626 (1964). However, neither of the promulgating agencies here is subject to the North Carolina Administrative Procedure Act. G.S. 150A-1, 150A-64. The court is therefore only required to take judicial notice of their regulations if submitted in accordance with certain procedures designed to insure their accuracy. G.S. 8-1 *et seq.* See generally, Brandis, N.C. Evidence §§ 11-12 (1982). Here, plaintiffs have shown us nothing in the record or the transcript indicating that the administrative regulations in question were properly submitted into evidence. The court was not required to take judicial notice of them and plaintiffs' assignment of error is without merit.

II

[3] By its cross-assignment of error, defendant contends that the trial court erred in refusing to direct the verdict for defendant and dismiss the case on the grounds that Southern was not the real party in interest. Defendant argues that the claims of the individual plaintiffs were not assignable and that, since they were not parties to the action, the action as filed should have been dismissed. While we agree that the purported assignment was contrary to public policy and ineffective, we do not agree that a directed verdict against the individual plaintiffs was appropriate.

G.S. 1A-1, Rule 17, provides, in pertinent part:

Southern Railway Co. v. O'Boyle Tank Lines

Every claim shall be prosecuted in the name of the real party in interest; No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Accordingly, upon objection by the defendant, the trial court directed that Williams, Ussery and Cloer be made parties to the action "as of the date of filing of the first complaint." All three of them indicated in writing that they agreed to be made parties, that they ratified and adopted the proceedings up to that point and that they agreed to be bound by the judgment in the case. Rule 17 provides that the date of such a joinder or ratification by the real party in interest relates back to the date the action was commenced, thus overcoming defendant's argument that the statute of limitations had run with respect to plaintiffs. *See Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978). Defendant's cross-assignment of error as to the individual plaintiffs is without merit.

While we hold that it was error for the trial court to grant defendant's motion for a directed verdict as to the individual plaintiffs, our view is different with respect to Southern Railway. Because the purported assignment of rights to Southern was ineffective under common law as contrary to public policy, 6 Am. Jur. 2d, Assignments, § 37, Annot., 40 A.L.R. 2d 500, and not within any statutory exception to the common law rule, G.S. 4-1; G.S. 1-57, Southern was not the real party in interest and defendant's motion for directed verdict was properly allowed against plaintiff Southern Railway. *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 234 S.E. 2d 206, *rev. denied*, 293 N.C. 159, 236 S.E. 2d 704 (1977).

As to the individual plaintiffs, we reverse the trial court and remand the cause for a new trial.

As to the corporate plaintiff, Southern Railway Company, we affirm entry of the directed verdict for defendants.

Murphrey v. Winslow

Affirmed in part; reversed and remanded in part.

Judge HILL concurs.

Judge HEDRICK concurs in the result in part and dissents in part.

Judge HEDRICK concurring in part and dissenting in part.

I concur in the result of that part of the majority decision that affirms the judgment directing a verdict for the defendant with respect to the claim of plaintiff, Southern Railway. I dissent, however, from that part of the decision that reverses the judgment directing a verdict for the defendant with respect to the cases of the additional plaintiffs, Williams, Cloer, and Ussery. In my opinion, where the additional plaintiffs have assigned their claims to their employer, and the majority has declared the original plaintiff, employer, not to be a real party in interest, and where the record affirmatively discloses that these employees, additional plaintiffs, have been paid by their employer for the precise claims that they undertook to assign and for which they now seek to recover from the defendant, the trial court correctly directed a verdict for the defendant.

BELLMONT MURPHREY v. HENRY WINSLOW AND JAMES H. WINSLOW

No. 837DC244

(Filed 21 August 1984)

1. Landlord and Tenant §§ 11, 19; Seals § 1—lease under seal—transfer of property—10-year statute of limitations applicable—lease not personal covenant

Where the pleadings established that the lease governing plaintiff's obligation to make rental payments on the subject property was executed by the original parties, including plaintiff, under seal, and the original lessor conveyed her interest in the property to defendants, the 10-year statute of limitations was applicable to defendants' claim, and there was no merit to plaintiff's claim that the lease itself must be assigned to the new grantee of the property in order for that grantee to obtain the benefit of the lease's seal, or that the seal constituted a "personal covenant" which would not run with the land and therefore pass to defendants as successors in interest to one of plaintiff's lessors. G.S. 42-8.

Murphrey v. Winslow

2. Landlord and Tenant § 19; Payment § 4— action for rent—defense of payment—summary judgment for landlord proper

Defendants were entitled to summary judgment for an unpaid rental payment due under a lease where the forecast of evidence established a set pattern by plaintiff for making rental payments and a sharp departure with respect to the disputed installment, but plaintiff's conclusory affidavit that the payment was simply "made" was insufficient because it failed to provide specific facts with regard to how the alleged payment was delivered, on what date it was made, and who received it.

Judge WEBB dissenting.

APPEAL by plaintiff from *Ezzell, Judge*. Judgment entered 17 January 1984 in District Court, EDGEcombe County. Heard in the Court of Appeals 8 February 1984.

On 2 September 1982, the plaintiff, Belmont Murphrey, instituted this declaratory judgment action pursuant to G.S. 1-253, *et seq.*, seeking a judgment that he is not indebted to defendants for certain rental payments due under a written lease. The complaint alleges that plaintiff was a lessee under a written lease executed under seal with the Winslow defendants' predecessors in title, McBride and Harrington. The lease was for a term of five years from 1 January 1973 to 31 December 1977. Plaintiff was obligated to make rental payments on 15 March and 15 September during the term of the lease. The complaint alleges further that Harrington subsequently conveyed her one-half undivided interest in the property to Pritchard, who in turn conveyed the same to defendants in April, 1974; that plaintiff has complied with the terms of the lease; and that plaintiff is claiming that the 15 March 1977 payment for \$2,000 was paid, and, in the alternative, that the debt is barred by the applicable statute of limitations.

The defendant appellees' answer admits the execution of the lease by the original parties under seal and the conveyance of Harrington's rights under the property to him; denies the payment by plaintiff of the 15 March 1977 rental installment; and counterclaims for that rental installment of \$2,000, plus interest and costs.

Plaintiff's reply to the counterclaim avers that Harrington's rights under the lease were never assigned to defendants and alleges as affirmative defenses payment and the three-year statute of limitations.

Murphrey v. Winslow

By failing to answer the defendants' request for admissions, plaintiff is deemed, pursuant to G.S. 1A-1, Rule 36 of the Rules of Civil Procedure, to have admitted the following facts:

1. In 1974, plaintiff was notified that the defendants had acquired the interest of Harrington in the subject farm and lease.
2. Thereafter, plaintiff began making the rental payments due Harrington under the lease to the defendants.
3. All of the rental payments made by plaintiff to the defendants under the lease have been by personal checks drawn on plaintiff's farm account with Edgecombe Bank and Trust Company.
4. The plaintiff has no canceled check, receipt or other written record that the \$2,000 rental payment in question was ever received by defendants or anyone in their behalf.

The defendants also filed affidavits denying that the \$2,000 rental payment of 15 March 1977 was ever received by them and averring that this amount remains due and not subject to any setoff; and that, except for that payment, plaintiff has made the remaining payments to them by personal check since the conveyance of the property to them in April, 1974.

Defendants thereafter filed a motion for summary judgment supported by the pleadings, the foregoing admissions and affidavits. In opposition to this motion, plaintiff filed his own affidavit, which restated the allegations of the complaint and included this final paragraph:

I have made all rental payments called for by the lease to the persons owning the property at the time each rental payment became due. More specifically, I made the \$2,000 rental payment to the Defendants which was due on March 15, 1977.

The trial court considered all of the foregoing and granted defendants' motion for summary judgment, dismissed plaintiff's action and rendered summary judgment for defendants on their counterclaim in the sum of \$2,000, plus interest and costs. Plaintiff appeals.

Murphrey v. Winslow

Bridgers, Horton & Simmons, by Edward B. Simmons, for plaintiff appellant.

Leroy, Wells, Shaw, Hornthal & Riley, by L. P. Hornthal, Jr., for defendant appellees.

JOHNSON, Judge.

The plaintiff presents two questions for review: (1) whether the trial court erred in failing to grant summary judgment against the defendants on the ground that any claim to rent due on 15 March 1977 was barred by the three year statute of limitations and (2) whether the trial court erred in granting the defendants' motion for summary judgment because the evidentiary forecast disclosed a genuine issue of material fact on the question of whether the disputed payment was made. For the reasons set forth below, we conclude that the plaintiff was not entitled to summary judgment because the ten year statute of limitations was applicable to defendants' claim. Further, that the defendants were entitled to summary judgment for the unpaid rent due under the lease because the plaintiff's conclusory affidavit failed to raise a genuine issue of fact on the defense of payment.

I

[1] The pleadings establish that the lease governing plaintiff's obligation to make rental payments on the subject property was executed by the original parties, including plaintiff, under seal. Ordinarily, proof that the obligation creating the indebtedness is a written instrument under seal repels the three year statute of limitations, *Lee v. Chamblee*, 223 N.C. 146, 25 S.E. 2d 433 (1943), and the rights of the parties would then be governed by the ten year period of limitations under G.S. 1-47(2). The question presented by plaintiff's appeal is whether the grantees of the lessor's interest in property are also entitled to the ten year statute of limitations absent a formal assignment of the sealed lease itself. In other words, whether the deed conveying the lessor's interest in the property carried with it the advantage of the extended limitation period applicable to the lease itself.

Plaintiff contends (1) that the lease itself must be assigned to the new grantee of the property in order for that grantee to obtain the benefit of the lease's seal and (2) that the seal constitutes

Murphrey v. Winslow

a "personal covenant" which would not run with the land and therefore pass to defendants as successors in interest to one of the plaintiff's lessors. We agree with neither contention.

As a preliminary matter, a conveyance of land, which is subject to a valid and continuing lease, passes to the purchaser the right to collect the rents thereafter accruing. *Pearce v. Gay*, 263 N.C. 449, 139 S.E. 2d 567 (1965).

When title passes, lessee ceases to hold under the grantor. He then becomes a tenant of the grantee, and his possession is grantee's possession. Attornment is unnecessary, G.S. 42-2.

Id. at 451, 139 S.E. 2d at 569. Plaintiff cites no authority in support of his contention that a separate assignment of the sealed lease is necessary to confer the benefit of the ten year statute of limitations on defendants. We agree with defendants that the question is governed by the provisions of G.S. 42-8 and the general rule that "the rights and liabilities existing between the grantee and lessee are the same as those existing between the grantor and the lessee, after the lessee is given notice of the transfer of the property." 51C C.J.S., Landlord and Tenant, § 258(2), pp. 672-673.

G.S. 42-8 specifically provides that the lessor's grantee has the like advantages and remedies by action for nonpayment of rent as the grantor or lessor or his heirs might have. The statute states in full:

The grantee in every conveyance of reversion in lands, tenements or hereditaments has the like advantages and remedies by action or entry against the holders of particular estates in such real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, have the like advantage and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs. (32 Hen. VIII, c. 34; 1868-9, c. 156, s. 18; Code, s. 1765; Rev., s. 1989; C. S., s. 2348.)

Murphrey v. Winslow

Plaintiff appears to argue that the provisions of G.S. 42-8 apply only to covenants in the lease "the benefits of which run with the land" and are "fundamental to the basic purpose of the lease," by relying upon statements contained in 49 Am. Jur. 2d, Landlord and Tenant, § 104, p. 138. That section provides as follows:

It is generally considered that at early common law covenants of the lessee were not assignable, and a transferee of the reversion could not sue at law in his own name upon such covenants. The foundation of the right of a transferee of the reversion to sue upon the covenants and agreements on the part of the lessee contained in the lease seems to be the early English Statute of 32 Henry VIII ch 34, which very generally in this country has been either adopted as a part of the common law or followed by legislation of similar import. It is said that the Statute of 32 Henry VIII ch 34 created a privity of contract in respect of the estate as between assignees of the reversion and the lessees or their assignees. Irrespective of the foundation of the rule, it is now well settled that a conveyance of the reversion brings the transferee in privity with the lessee and enables him to enforce all of the covenants in the lease the benefits of which run with the land. . . .

. . . .

But the Statute of 32 Henry VIII ch 34, and those of similar import, do not confer upon the transferee the right to sue upon all the covenants of the lessee contained in the lease, but only upon such covenants as are deemed to run with the land. Covenants and stipulations which are wholly foreign to the subject matter of the lease may be, and often are, inserted, and, while they are binding between the immediate parties thereto, are so disconnected from the estate that they do not pass by a transfer of the reversion, but remain as covenants between the original parties. (Citations omitted.)

Plaintiff argues that the seal is not one of the "advantages" accruing to the lessor's grantee under G.S. 42-8 because the seal of the lease is a "personal covenant" with no bearing on the subject matter of a lease for agricultural purposes. We find plaintiff's argument unpersuasive.

Murphrey v. Winslow

First, the contention that a seal is a personal covenant is unsupported by either precedent or logic. Plaintiff cites no authority for this proposition. Historically, a seal was usually employed on instruments to authenticate the due execution of the documents. Webster, Real Estate Law in North Carolina § 197, p. 204. In contrast, the "covenants" in a lease generally contain agreements concerning the leased premises which frequently shift a duty from one party to the other, or bind the parties to a lease to duties not required of them by the general law of landlord and tenant. *Id.* at § 237, p. 245.

The inclusion of a seal in a lease agreement neither creates a duty between the parties nor shifts a pre-existing duty from one party to the other. It merely extends, by operation of law, the period of time in which the parties expose themselves to suit on the particular sealed instrument from three years to ten years. G.S. 1-47(2); *cf. Rose v. Materials Co.*, 282 N.C. 643, 194 S.E. 2d 521 (1973). Therefore, the seal may not be properly considered a covenant at all, personal or otherwise.

Secondly, plaintiff's definition of the "like advantages and remedies by action" accruing to the lessor's grantees (defendants) under G.S. 42-8 is unnecessarily restrictive. As the court in *Pearce v. Gay*, *supra*, noted, when title passes, the lessee ceases to hold under the grantor and he becomes a tenant of the grantee. In other words, privity is automatically established between the lessor's grantee and the lessee. In this case, the ten year statute of limitations would apply to the lessor's action for unpaid rent. Under plaintiff's construction of G.S. 42-8, in an action for unpaid rent, the lessor's grantee would only be entitled to a three year limitation period, while the lessor himself would be entitled to a ten year period in which to bring suit. The extended period is clearly in the nature of an "advantage" or remedy by action and therefore it comes under the express terms of G.S. 42-8. Accordingly, the defendant grantees in this case were entitled to the benefit of the ten year statute of limitations for instruments under seal and the trial court properly refused to enter summary judgment in plaintiff's favor on this issue.

II

[2] Next, plaintiff contends that the trial court erred in granting defendants' motion for summary judgment on the question of pay-

Murphrey v. Winslow

ment on the grounds that the evidentiary forecast disclosed a genuine issue of material fact for resolution at trial. We do not agree.

It is well settled that the defendants were entitled to summary judgment in their favor only if they were able to show "that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). In other words, the burden is on the moving party to establish the lack of a triable issue of fact. 11 Strong's N. C. Index 3d, Rules of Civil Procedure, § 56.2, p. 354.

Payment is an affirmative defense which must be established by the party claiming its protection. 10 Strong's N. C. Index 3d, Payment, § 4, pp. 129-130; G.S. 1A-1, Rule 8. Where the creditor's evidence establishes an existing indebtedness and nonpayment, and the debtor offers no competent evidence in support of his defense of payment, summary judgment or directed verdict for the creditor is properly granted. *Manufacturing Co. v. Jefferson*, 216 N.C. 230, 4 S.E. 2d 434 (1939); *Bank v. Woronoff*, 50 N.C. App. 160, 272 S.E. 2d 618 (1980), *cert. denied*, 302 N.C. 629, 280 S.E. 2d 449 (1981). Upon a proper showing, summary judgment in favor of a party with the burden of proof is properly entered. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). We conclude that defendants' forecast of the evidence clearly establishes plaintiff's debt for the unpaid rental installment; nonpayment and the lack of setoff; and further shows that plaintiff cannot prevail as a matter of law on his affirmative defenses of payment.

Essentially, plaintiff does not attack the sufficiency of defendants' evidentiary forecast to support summary judgment. Rather, the argument in plaintiff's brief is confined to the contention that he met the burden of establishing a triable issue of fact by the introduction of his own affidavit. In *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982), the Supreme Court reiterated the nature of the showing that a party opposing summary judgment must make in order to avoid the entry of judgment against him.

If the moving party satisfies its burden of proof, then the burden shifts to the nonmoving party to "set forth *specific facts* showing that there is a genuine issue for trial." Rule 56(e), Rules of Civil Procedure (emphasis added). The nonmov-

Murphrey v. Winslow

ing party "may not rest upon the mere allegations of his pleadings." *Id.*

Subsection (e) of Rule 56 does not shift the burden of proof at the hearing on motion for summary judgment. The moving party still has the burden of proving that no genuine issue of material fact exists in the case. However, when the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleadings, he does so at the risk of having judgment entered against him. The opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue of fact exists. *See Shuford, N. C. Civil Practice and Procedure*, § 56-9 (2d ed. 1981). *However subsection (e) of Rule 56 precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts.* (Emphasis original.)

305 N.C. at 369-370, 289 S.E. 2d at 366. The ultimate goal of the procedural device of summary judgment is to allow penetration of an unfounded claim or defense before trial. *Id.* at 369, 289 S.E. 2d at 366.

In this case, plaintiff's bare assertion in his affidavit that he "made" the disputed March, 1977 payment fails to create a genuine issue of fact on plaintiff's affirmative defense in the context of defendants' evidentiary forecast.

Plaintiff, by his failure to answer defendants' requests for admissions, is deemed to have admitted to the following pursuant to G.S. 1A-1, Rule 36:

3. All the rental payments made by plaintiff to defendants under the terms of said lease have been by personal checks drawn on the Farm Account of Mr. and Mrs. Belmont Murphrey with Edgecombe Bank and Trust Company, Tarboro, North Carolina.

4. The plaintiff has no canceled check, receipt, or other written record that the \$2,000 rental payment due the defendants

Murphrey v. Winslow

under said lease on March 15, 1977 was ever received by defendants or anyone in their behalf.

Additionally, defendants, in their affidavits, assert that the March 1977 rental installment was never received by them. The defendants' forecast of the evidence shows, therefore, a set pattern established by plaintiff for making the rental payments and a sharp departure with respect to the disputed installment. In order to establish a genuine triable issue of fact in the face of defendants' showing, it was incumbent upon plaintiff to offer evidence explaining this departure, i.e., how the March, 1977 installment was paid and that defendants in fact received the payment in question.

Plaintiff's conclusory allegation that the payment was simply "made" is insufficient in this factual context because it fails to provide specific facts with regard to *how* the alleged payment was delivered, on what date it was made, and who received it. The lack of written evidence of the alleged March, 1977 payment by defendants is particularly telling when *every other* payment was made by personal check drawn on the plaintiff's farm account. It is evident that the answers to the question raised by defendants' request for admissions would entail factual assertions within the power of the plaintiff to supply. By failing to do so, plaintiff has simply failed to raise a triable issue of fact.

The case at bar is analogous to *Lowe v. Bradford, supra*, where the plaintiff was seeking damages caused by the defendants' alleged interference with their access to plaintiff's property by the construction of a concrete driveway. On motion for summary judgment, defendants' evidence showed that the driveway neither restricted plaintiff's access to his property nor caused him any damage. Plaintiff's affidavit merely stated that his access to the lot has been restricted, without stating any specific facts in that regard. The court held that summary judgment in defendants' favor was properly granted.

We conclude that plaintiff failed to comply with the response requirements of Rule 56(e). Plaintiff did file a verified affidavit to support his unverified complaint. However, it merely repeated the essential allegations of his complaint, i.e., that access to his lot had been restricted and the value of his lot had been impaired. It added nothing to his complaint. It

Murphrey v. Winslow

gave no *specific facts* which indicated in what manner the driveway interfered with plaintiff's access to his lot.

* * *

In a word, plaintiff had failed to present any *specific facts* to show how the driveway has interfered with use of his easement or how it has impaired the value of his property; his allegations are merely conclusory. "Rule 56(e) clearly precludes any party from prevailing against a motion for summary judgment through reliance on such conclusory allegations unsupported by facts." (Citations omitted.)

305 N.C. at 371, 289 S.E. 2d at 367.

Similarly, the plaintiff in this case has failed to come forward with any specific facts to establish the manner in which he "made" the payment in question. In the context of his past practices, this omission is fatal. Accordingly, plaintiff has failed to sustain his burden of establishing the existence of a genuine issue for trial and the trial court properly granted defendants' motion for summary judgment on their counterclaim for the rental payment due in March of 1977.

In summary, the plaintiff was not entitled to summary judgment because the ten year statute of limitations for instruments under seal applies to the lease in question and defendants were entitled to summary judgment for the unpaid rental payment due under that lease because plaintiff's conclusory affidavit raised no genuine issue of fact on the defense of payment.

Affirmed.

Chief Judge VAUGHN concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. When the plaintiff filed an affidavit saying he made the rent payment, I believe this created a triable issue as to whether the rent had been paid. It appears to me that the district court and this Court have considered the evidence and found as a

Gaito v. Auman

fact that the rent has not been paid. This is the province of the jury.

SAM GAITO AND WIFE, ELEANOR H. GAITO v. HOWARD FRANK AUMAN, JR.
v. ALVIN LEGRAND, INDIVIDUALLY AND D/B/A ALVIN LEGRAND PLUMBING
AND HEATING

No. 8320DC500

(Filed 21 August 1984)

Sales § 6.4— house builder-vendor—warranty of habitability—10-year statute of limitations

The implied warranty of habitability extends to all sales of residential housing by a builder-vendor to the initial vendee within the maximum statute of limitations period of 10 years, and it does not matter that renters may have lived in the house during those years. G.S. 1-52(16).

Judge HEDRICK dissenting.

APPEAL by defendant from *Burris, Judge*. Judgment entered 9 November 1982 in District Court, MOORE County. Heard in the Court of Appeals 15 March 1984.

Plaintiffs, Sam Gaito and his wife, Eleanor H. Gaito, filed this action on 19 May 1981 to recover the costs of repairing a defective air conditioning system in the house they had purchased from the defendant homebuilder, Howard Frank Auman, Jr. Plaintiffs were the home's initial vendees and sought recovery from the builder-vendor on the ground of breach of implied warranty of habitability. Defendant filed an answer on 24 July 1981 and filed an amended answer on 20 October 1981, denying liability on the ground that no implied warranty of habitability attached since the house was not newly completed or under construction at the time of the sale; construction of the house was completed in September, 1973 and the defendant sold the home to the plaintiffs in April, 1978. Defendant also filed a third-party complaint against Alvin LeGrand, the subcontractor who installed the air conditioning system when the house was under construction in 1973.

The case was tried before a jury and the jury found that defendant had breached an implied warranty of workmanlike quality regarding the house he sold to plaintiffs, and awarded plain-

Gaito v. Auman

tiffs \$3,655 in damages. Judgment was entered on the verdict and defendant appeals.

Brown, Holshouser and Pate, by G. Les Burke, for defendant appellant.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for plaintiff appellees.

JOHNSON, Judge.

This appeal presents a question of first impression arising out of the doctrine of implied warranty of habitability in the sale of a new dwelling. That is, whether a residential structure which is approximately four and a half years old at the time of the sale from the builder-vendor to the initial purchaser may be considered to be a "new dwelling" for implied warranty purposes. For the reasons set forth below, we conclude that a residential structure may be considered "new" for warranty purposes within the maximum statute of limitations period, which is presently ten years. G.S. 1-52(16); *Earls v. Link*, 38 N.C. App. 204, 247 S.E. 2d 617 (1978). Accordingly, we affirm the judgment rendered below.

The material facts are not in dispute. The defendant, Howard Frank Auman, Jr. is in the business of building houses. The house in question was built in the fall of 1973 for "speculation," that is, not pursuant to a contract with a purchaser. The house was not conveyed by deed to a purchaser until 1978, when the plaintiffs bought it from the defendant. Although the house was listed for sale during the remainder of 1973, it remained vacant until 1974. From 1974 to 1978 the house was successively rented to Lee Cole, Jack Vernon and Ray Ashley.

Ashley, who rented the house from March, 1976 to 31 July 1977, had problems cooling the house. The central air conditioning system failed to work properly and could not cool the house more than 10 degrees below the outside temperature. In the fall of 1976, Ashley hired Metrah Spencer to replace the compressor and do work on the air ducts. The work done on the air conditioning system did not increase the size or capacity of the compressor.

In January, 1978, the house was listed for sale with Caulk, Calhoun and Bertrand Realty, and was shown to the plaintiffs by

Gaito v. Auman

Thomas Caulk. The plaintiffs were aware of the age of the house and were told that it had been rented for two short periods of time. Plaintiffs decided to purchase the house and the closing took place in April, 1978. The plaintiffs began occupying the house in June, 1978.

Plaintiffs, who never had central air conditioning before, experienced problems with the air conditioning system from the outset. When the system was turned on, it cooled the house by only 10 degrees. Although the plaintiffs attempted to contact defendant about the problem, he did not respond. Plaintiffs then had some minor repairs performed on the system. Eventually they learned that the problem was caused by the inadequate size of the compressor.

At trial, plaintiffs presented the uncontradicted testimony of an expert in the area of heating and air conditioning that the accepted standard for cooling in 1973 was a 20 degree differential from the outside temperature and in 1978 was a 15 degree differential. In the expert's opinion, the plaintiffs' house should have been equipped with a four ton capacity unit instead of the three and a half ton capacity unit that defendant had installed.

Taken together, plaintiffs' evidence showed that (1) the defendant vendor is in the business of building houses; (2) plaintiffs are the initial purchasers of the house in question; (3) the central air conditioning system failed to function properly from the outset because the air conditioning unit installed by defendant in 1973 was inadequate in capacity to cool the house to an accepted standard; (4) despite the various repairs undertaken on the system between 1973 and 1978, no change had been made in the size or capacity of the unit at the time plaintiffs purchased the house or at any relevant time thereafter; (5) the defect was not apparent at the time of the sale and plaintiffs did not discover the defect until sometime after they purchased the home; and (6) the air conditioning system failed to cool the house to an accepted standard at the time of plaintiffs' occupancy in 1978.

The core of the defendant vendor's argument is that despite the foregoing factual circumstances, he cannot be held liable for breach of implied warranty of fitness for habitation because several years had intervened between the home's construction and sale, and the house had been lived in by various renters dur-

Gaito v. Auman

ing that four and a half year period. Significantly, defendant does not contend that the central air conditioning system is not within the scope of the implied warranty accompanying the sale of residential structures and we have no hesitancy in concluding that it is. Furthermore, defendant does not argue that the air conditioning unit installed in the house prior to its completion was of a proper capacity to adequately cool the house, nor does he contest the fact that the size or capacity of the unit remained unaltered between the time of construction and the date of sale to plaintiffs. Defendant's sole contention is that a house which is four and a half years old at the time of its initial sale from the builder-vendor to a consumer-vendee cannot be considered "new" or "recently completed" for implied warranty purposes. We disagree.

The question posed by this appeal must be considered against the backdrop of the development of the implied warranty. It is now well settled in this jurisdiction that an implied warranty of habitability accompanies the sale of "newly" constructed dwellings. The rule was first stated as follows:

[I]n every contract for the sale of a recently completed dwelling . . . the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and . . . this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

Hartley v. Ballou, 286 N.C. 51, 62, 209 S.E. 2d 776, 783 (1974). Subsequent opinions by North Carolina courts have clarified and expanded the scope of the implied warranty's nature and application.

In *Lyon v. Ward*, 28 N.C. App. 446, 450, 221 S.E. 2d 727, 729 (1976), *Hartley* was interpreted by this Court "to stand for the proposition that a builder-vendor impliedly warrants to the initial purchaser that a house and all its fixtures will provide the service

Gaito v. Auman

or protection for which it was intended under normal use and conditions." Judge Hedrick noted that, in adopting the implied warranty exception to the rule of *caveat emptor*, North Carolina courts have followed the "developing trend in the United States which recognizes that there ought to be an implied understanding of the parties when an agreed price is paid that the home is reasonably fit for the purpose for which it is to be used." 28 N.C. App. at 450, 221 S.E. 2d at 729. "The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser, but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work." *Id.*; quoting *Humber v. Morton*, 426 S.W. 2d 554, 562 (Tex. 1968). In *Lyon*, the builder-vendor was held to have impliedly warranted to the initial purchasers that a well constructed by him on the premises and sold as an integral part of the house would provide an adequate, usable water supply for the house.

In *Hinson v. Jefferson*, 287 N.C. 422, 435, 215 S.E. 2d 102 (1975), the Supreme Court extended this "well-reasoned exception" to cover the ability of land conveyed subject to restrictive covenants to be used in accordance with the limited uses specified in the covenants. See also *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E. 2d 557 (1976) (implied warranty breached by poor waterproofing causing standing water in crawlspace); *George v. Veach*, 67 N.C. App. 674, 313 S.E. 2d 920 (1984) (septic tank system comes within coverage of implied warranty); *Earls v. Link, Inc.*, 38 N.C. App. 204, 247 S.E. 2d 617 (1978) (builder-vendor warrants that a fireplace and attached chimney will adequately remove smoke). See generally, Annot., 25 A.L.R. 3d 383 (1969).

The foregoing decisions have all concerned implied warranties arising upon the sale of undisputed new or recently completed dwellings to an initial purchaser. Although no recovery has yet been granted to a plaintiff who was not the initial purchaser on the basis of breach of implied warranty, this Court has extended implied warranty protection to one who inherits a new home from the original vendee, despite the passage of several years between construction and inheritance. *Strong v. Johnson*, 53 N.C. App. 54, 57, 280 S.E. 2d 37, 40 (1981).

Gaito v. Auman

In *Strong*, the defendant had conveyed a lot to the plaintiff's sister and constructed a dwelling on it in 1974. In 1977, plaintiff inherited the property when his sister died. The home was then damaged in 1978 when a fire, allegedly caused by faulty construction of the fireplace, broke out. After reviewing the relevant decisions and policies for allowing recovery, this Court could find "no reason" to bar recovery by the original purchaser's devise. The fact that the home was no longer "brand new" or "recently constructed" at the time it passed to the plaintiff by will was evidently of no concern to the court. *See also Sullivan v. Smith*, 56 N.C. App. 525, 289 S.E. 2d 870; *disc. rev. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982) (purchaser of a dwelling from the original vendees may maintain an action for negligent construction against the general contractor for latent defect in fireplace and chimney). *But see Oates v. Jag, Inc.*, 66 N.C. App. 244, 311 S.E. 2d 369 (1984) (third purchasers of a dwelling house barred from recovery for negligent construction from the original builder on the basis of judicial reluctance to further limit traditional doctrine of *caveat emptor*).

We note in passing that courts in a number of jurisdictions which have considered the matter have generally allowed a subsequent or remote purchaser to recover where actual negligence on the part of a builder-vendor which results in foreseeable injury or loss is proven. Annot., 10 A.L.R. 4th 385, 388 (1981). Some courts have also extended an implied warranty of merchantability or habitability from a builder to remote purchasers. *See, e.g., Terlinde v. Neely*, 275 S.C. 395, 271 S.E. 2d 768 (1980); *Moxley v. Laramie Builders, Inc.*, 600 P. 2d 733 (Wyo. 1979). The extension is generally limited to latent defects, not discoverable by a subsequent purchaser's reasonable inspection, manifesting themselves after the purchase. Furthermore, the age of the house has not figured prominently in any discussion of whether the warranty should attach, but is properly considered as a factor in determining whether a breach has occurred. *See, e.g., George v. Veach, supra; Terlinde v. Neely, supra; Moxley v. Laramie Builders, Inc., supra.*

The foregoing review discloses a trend in this and other jurisdictions toward adoption of a more inclusive implied warranty theory. The question presented by this appeal—the length of time that a dwelling may be considered "new" or "recently com-

Gaito v. Auman

pleted" for warranty purposes—must be considered in light of the policy concerns which led to the creation of this exception to the rule of *caveat emptor*.

[T]he trend of judicial opinion is to invoke the doctrine of implied warranty of fitness in cases involving sales of new houses by the builder. The old rule of *caveat emptor* does not satisfy the demands of justice in such cases. The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime. To apply the rule of *caveat emptor* to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses is manifestly a denial of justice.

Humber v. Morton, supra, 426 S.W. 2d at 561.

Clearly, the purpose of a warranty is to protect the innocent purchasers and to hold the builders accountable for the quality of their work. The relevant economic policy considerations in this area were aptly summarized by Judge Whichard in *George v. Veach, supra*.

[B]y virtue of superior knowledge, skill, and experience in the construction of houses, a builder-vendor is generally better positioned than the purchaser to know whether a house is suitable for habitation. He also is better positioned to evaluate and guard against the financial risk posed by a defective septic system, and to absorb and spread across the market of home purchasers the loss therefrom. In terms of risk distribution analysis, he is the preferred or "least cost" risk bearer. Finally, he is in a superior position to develop or utilize technology to prevent such defects; and as one commentator has noted, "the major pockets of strict liability in the law" derive from "cases where the potential victims . . . are not in a good position to make adjustments that might in the long run reduce or eliminate the risk." R. Posner, *Economic Analysis of Law* 140-41 (2d ed. 1977).

67 N.C. App. at 680, 313 S.E. 2d at 923-924. In view of these policy considerations, any reasoning which would arbitrarily bar the initial vendees' right to maintain an action for a latent defect on the basis of the age of the house at the time of sale is untenable.

Gaito v. Auman

With the object of habitable housing in mind, latent defects that render a house unlivable or render its fixtures unusable or virtually nonfunctional should not be overlooked merely because the house is four, five or even eight years old at the time of sale. Moreover, it is the nature of a "latent" defect that it will not usually manifest itself until some time has elapsed.

Although nearly every reported decision in this area of the law, with the exception of *Lyon v. Ward*, *supra*, has at least referred to the fact that the building was either under construction or undisputedly recently constructed when sold, no case that our research has disclosed has directly addressed the question of what constitutes a "new" or "recently completed" house for warranty purposes. Inasmuch as the relevant authorities and policy considerations all point toward an expansion in warranty protection, in the interests of fairness and judicial economy, the question of "newness" at the time of the sale demands a rule of general applicability.

This very question was addressed in Note, The Implied Warranty of Habitability in North Carolina Revisited, 58 N.C.L. Rev. 1055 (1980), in the context of a discussion on extending warranty protection to subsequent purchasers. However, the reasoning is equally applicable to the situation under discussion. The Note's author proposed that a home should be considered "new" for warranty purposes throughout the duration of the maximum statute of limitations period, which, pursuant to the decision in *Earls v. Link, Inc.*, *supra*, is presently set at ten years under G.S. 1-52(16) (cause of action in tort or contract shall not accrue until date latent injury or damage is discovered or should reasonably have been discovered; provided that no action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action). 58 N.C.L. Rev. at 1067.

We find the reasoning behind this proposal persuasive. As the author points out, the builder-vendor remains adequately protected from "endless liability" by the bar of the statute of limitations, by the requirement of the finding of a latent defect, and by considerations of such factors as the age and prior use of the home in determining whether a breach of implied warranty has occurred in the particular case. 58 N.C.L. Rev. at 1068. Accordingly, we hold that the implied warranty of habitability extends to

Gaito v. Auman

all sales of residential housing by a builder-vendor to the initial vendee¹ within the maximum statute of limitations period of 10 years.

Here, the initial vendees purchased their home from the builder-vendor in 1978. Their evidence showed that the defect existed at the time of the home's construction in 1973 and was present at the time of sale in 1978. Further, it showed that the defect in the central air conditioning system was not apparent at the time of purchase and did not manifest itself to plaintiffs until some months after the purchase, in the summer of 1978. Plaintiffs notified defendant of the problem and received no response. After several unsuccessful minor repairs were undertaken, they learned that the defect was in the size of the air conditioning unit itself and that the cost of correcting the problem would be \$3,655. Plaintiffs filed this action on 19 May 1981, within three years of the accrual of their cause of action under G.S. 1-52(16), and well within the 10 year maximum statute of limitation period. The house they purchased may therefore be considered "new" for warranty purposes, and judgment was properly entered by the trial court on the jury verdict in plaintiff's favor.

We have carefully examined defendant's other assignment of error and find it to be without merit.

Affirmed.

Judge HILL concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

In my opinion the builder-vendor's implied warranty of habitability, *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974); *Lyon v. Ward*, 28 N.C. App. 446, 221 S.E. 2d 727 (1976), does not apply to an air-conditioning unit that was installed in a house at the time of construction of the house four-and-one-half years

1. Although we need not address the question as to whether an implied warranty should be extended to subsequent purchasers of the property, we note that the logic of this holding would apply to such situations.

Square D Co. v. C. J. Kern Contractors

before that house was sold to the plaintiffs. *Lyon*, cited by plaintiffs and relied on by the majority in its decision, is clearly factually distinguishable. Moreover, I am particularly disturbed by the footnote in the majority decision suggesting that an implied warranty of habitability might extend as well to subsequent purchasers. I vote to reverse the order denying the defendant's motions for a directed verdict and for judgment notwithstanding the verdict.

The majority has not discussed, and apparently has not considered, defendant's assignment of error relating to damages. If the trial court did not err in denying defendant's motions for a directed verdict and judgment notwithstanding the verdict, in my opinion, the defendant is entitled to a new trial because the record discloses a manifest miscarriage of justice with respect to the issue of damages. Under the circumstances of this case it is clear to me that the cost of replacing a three-and-one-half ton air conditioning unit, which is in no way defective and is no more than four-and-one-half years old, with a new four ton unit is not the correct measure of damages.

SQUARE D COMPANY v. C. J. KERN CONTRACTORS, INC., AND SIX ASSOCIATES, INC.

No. 8328SC468

(Filed 21 August 1984)

1. Corporations § 22; Seals § 1— corporate seal on contract—10-year statute of limitations inapplicable

In an action to recover for breach of contract and negligence on the part of defendant general contractor in the construction of a building, there was no merit to plaintiff's contention that the jury could have found that the contract between plaintiff owner and defendant contractor was under seal because the corporate seal was placed on the contract, and the trial court properly granted summary judgment for defendant, since the mere affixation of a corporate seal to a document does not automatically raise it to the status of an instrument under seal; the contract in question contained no recitals or other evidence of an intent to create an instrument under seal; and defendant's president averred that the corporate seal was placed on the contract for the purpose of indicating that its execution was duly authorized by the corporation and to confirm that he, as an individual, was not a party to it.

Square D Co. v. C. J. Kern Contractors

2. Architects § 3— negligence—action barred by 6-year statute of limitations

Plaintiff's action to recover for the alleged negligence of defendant architects in designing and inspecting a wall was barred by the statute of limitations where defendants completed their work for plaintiff prior to 1 January 1974 and plaintiff filed its complaint on 16 March 1982, more than six years from the last act or omission giving rise to the action. G.S. 1-50(5).

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Lewis, Robert D., Judge*. Orders entered 7 January 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 12 March 1984.

Long, Parker, Payne & Matney, P.A., by Ronald K. Payne and Mary Elizabeth Arrowood, for plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr., and Reid L. Phillips, for C. J. Kern Contractors, Inc., defendant appellee.

Kennedy, Covington, Lobdell & Hickman, by F. Fincher Jarrell, for Six Associates, Inc., defendant appellee.

WHICHARD, Judge.

I.

The trial court granted summary judgment in favor of defendants, a contractor and an architectural firm, on the ground that plaintiff's claims against them were untimely filed. We affirm.

II.

Count One of the complaint, which plaintiff filed on 16 March 1982, alleged the following:

In 1972 plaintiff entered a contract with defendant C. J. Kern Contractors, Inc. (Kern), as general contractor, for construction of an addition to a building on lands which plaintiff owned. Kern completed the construction pursuant to the contract.

On or about 1 November 1980 plaintiff, through its agents and employees, began to notice lateral bowing in a wall of the addition. The bowing was caused by Kern's deviations, in several respects, from the contract specifications. The structural integrity

Square D Co. v. C. J. Kern Contractors

of the wall was seriously damaged as a result of these deviations, and the wall had to be repaired at great expense to plaintiff.

As a direct and proximate result of Kern's deviation from the contract specifications and its breach of the contract, plaintiff incurred damages in repairing and stabilizing the wall in an amount in excess of \$150,000. The defects in the wall, and breach of Kern's contract, were not apparent or discoverable until the damage occurred and the wall "bowed out."

Count Two of the complaint made essentially the same allegations, except that the defects in plaintiff's wall were attributed to Kern's negligence in construction rather than to its breach of contract.

Count Three of the complaint alleged the following: In 1971 plaintiff entered a contract with defendant Six Associates, Inc. (Associates) for the provision of basic architectural services. Under the terms of that contract Associates subsequently undertook to provide architectural services on the construction by Kern of the addition to the building on plaintiff's land. Associates was negligent in designing the wall in question, and in the inspection of its construction, in specified respects. As a result of Associates' negligence plaintiff incurred damages in repairing and stabilizing the wall in excess of \$150,000.

Plaintiff prayed that "it have and recover, jointly and severally, of each of the Defendants . . . the sum of \$150,000.00 . . . and the costs of [the] action."

III.

Pursuant to G.S. 1A-1, Rule 12(b)(6), Kern moved to dismiss the complaint on the ground that it showed on its face that the action was barred by the applicable statute of limitations. Associates also moved for dismissal under Rule 12(b)(6) on the ground that "the . . . action is barred by the applicable statute of limitations including G.S. 1-50(5)."

The parties stipulated that affidavits and evidence forecast by discovery could be considered by the court, and that Kern's motion could be treated as one for summary judgment. The pertinent matters outside the pleadings which the court considered included:

Square D Co. v. C. J. Kern Contractors

(1) An affidavit from the head of Associates' Structural Engineering Department averring that Kern completed the addition to plaintiff's building prior to 1 January 1974, and that Associates completed all work performed under its contract with plaintiff prior to 1 January 1974.

(2) Plaintiff's admission, in response to Associates' request, that Associates completed all work performed under its contract with plaintiff prior to 1 January 1974, except that "as built" drawings may have been supplied in 1974."

(3) Plaintiff's admission, in response to Kern's request, that Kern's acts or omissions in construction of the addition occurred more than six years prior to institution of this action.

(4) The deposition of plaintiff's plant engineering manager, who was responsible for "coordinating and working directly with" Kern and Associates, which stated:

It was late in 1973 when most of the work had been accomplished. The construction was finished by 26 November 1973. The "punch list may not have been completed" by then, "but in any event those items on the punch list were finished by January 1 of '74."

The bowing of the wall was brought to his attention in the fall of 1980 by the maintenance foreman. When he looked at the wall he could see that its whole length had been caulked previously.

He was familiar with a loss report filed with Affiliated FM Insurance Company in November 1980. The report stated that four years earlier employees had complained about cold air, and caulking had been provided "at the wall at floor level." The year before he gave the deposition employees again complained and the wall again was caulked.

(5) The loss report filed for plaintiff with Affiliated FM Insurance Company, which showed a "date of loss" of 1 November 1980 and a "date inspected" of 24 November 1980, and which stated that "[a]pproximately four years ago, [plaintiff's] employees [had] complained about cold air at the east side of the building," and that "[c]aulking was provided at the wall at floor level."

Square D Co. v. C. J. Kern Contractors

(6) An affidavit from Kern's president, who executed the contract on Kern's behalf, averring that Kern's corporate seal was placed on the contract for the purpose of indicating that its execution was duly authorized by the corporation and to confirm that he, as an individual, was not a party to it; that at no time was there any discussion or other communication between the parties or their agents regarding whether the contract would be a "sealed" instrument within the meaning of G.S. 1-47(2), or for any other purpose; and that neither he nor Kern ever intended that the contract would be a "sealed" instrument within the meaning of G.S. 1-47(2), or for any other purpose.

(7) An affidavit from an employee of plaintiff averring that the defects alleged in plaintiff's complaint were not discovered until November 1980. Attached to the affidavit was the original contract between plaintiff and Kern which showed execution by Kern's president and affixation of Kern's corporate seal.

The court considered "the pleadings, admissions, answers to interrogatories, stipulations of counsel, affidavits, depositions, and other matters of record"; found that there was no genuine issue of material fact and that Kern was entitled to judgment as a matter of law; and entered summary judgment for Kern. In a separate order it treated Associates' motion as one for summary judgment; found that there was no genuine issue as to any material fact and that Associates was entitled to judgment as a matter of law; and entered summary judgment for Associates.

Plaintiff appeals.

IV.

CONTRACTOR

[1] Plaintiff's sole argument for reversal of the summary judgment in favor of Kern is that the jury could have found the contract between plaintiff, as owner, and Kern, as contractor, to be under seal, and thus subject to G.S. 1-47(2), the ten year statute of limitations. The argument is based on the affixation of Kern's corporate seal to the contract.

Because our review is limited to questions presented in the briefs, N.C.R. App. P. 28(a), plaintiff in effect concedes that unless this argument has merit, the trial court ruled correctly. A recent

Square D Co. v. C. J. Kern Contractors

decision of this Court, *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 301 S.E. 2d 459, *disc. rev. denied*, 309 N.C. 319, 306 S.E. 2d 791 (1983), applied to the uncontroverted forecast of evidence, requires a holding that the trial court ruled correctly on the question presented.

The mere affixation of a corporate seal to a document does not automatically raise it to the status of an instrument under seal.

Because the routine use of a corporate seal is merely to demonstrate authority to execute a document, the mere presence of a corporate seal, without more, does not convert the document into a specialty. A document is not considered a specialty unless there is evidence of intent to create an instrument under seal in the document itself such as a recital that the instrument would be under seal, or the words "corporate seal" or "affix corporate seal."

Blue Cross, supra, 61 N.C. App. at 362, 301 S.E. 2d at 465-66.

The contract here contains no recitals or other evidence of an intent to create an instrument under seal. The only forecast of evidence on this question, the affidavit of Kern's president, expressly denied the existence of such intent. The president averred that Kern's corporate seal was placed on the contract for the purpose of indicating that its execution was duly authorized by the corporation and to confirm that he, as an individual, was not a party to it. He further averred that at no time was there any discussion or other communication between the parties or their agents regarding whether the contract would be a "sealed" instrument within the meaning of G.S. 1-47(2), or for any other purpose; and that neither he nor Kern ever intended that the contract would be a "sealed" instrument within the meaning of G.S. 1-47(2), or for any other purpose.

In the absence of recitals or other evidence in the contract itself of intent to create an instrument under seal, and confronted with clear, uncontroverted evidence that no such intent existed, the trial court did not err in refusing to deny Kern's motion for summary judgment on the ground that the contract was a sealed instrument subject to the ten year statute of limitations. Insofar as the sealed instrument question was determinative, summary

Square D Co. v. C. J. Kern Contractors

judgment for Kern was appropriate. Since that is the only question presented, the order granting summary judgment in favor of Kern, and dismissing counts one and two of the complaint with prejudice, must be affirmed. N.C.R. App. P. 28(a).

V.

ARCHITECT

[2] A. Associates' motion to dismiss, which was treated as a motion for summary judgment, was made "on the grounds that the plaintiff's action is barred by the applicable statute of limitations including G.S. 1-50(5)." While the trial court did not indicate the statute on the basis of which it ruled for Associates, we hold that the judgment was proper under the provisions of G.S. 1-50(5) (1983).

G.S. 1-50(5) (1983) provides, in pertinent part:

- a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.
- b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

. . . .

9. Actions against any person . . . who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction

. . . .

. . . .

- g. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c), G.S. 1-52(16) and G.S. 1-47(2).

The uncontroverted forecast of evidence established that Associates completed its work for plaintiff, and that plaintiff's building was completed, prior to 1 January 1974. Plaintiff filed its complaint on 16 March 1982, "more than six years from the later

Square D Co. v. C. J. Kern Contractors

of the specific last act or omission of [Associates] giving rise to the cause of action or substantial completion of the improvement." G.S. 1-50(5)a. G.S. 1-50(5) by its terms thus clearly bars plaintiff's claim against Associates.

B. We note that G.S. 1-50(5) was rewritten substantially in 1981. Act of June 22, 1981, ch. 644, § 1, 1981 N.C. Sess. Laws 924, 924-25. The amended version, quoted above in pertinent part, became effective on 1 October 1981, but was made inapplicable to litigation pending at that time. *Id.* § 2, at 925; see *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 426 n. 3, 302 S.E. 2d 868, 872 n. 3 (1983). This action was not pending at that time, but was filed on 16 March 1982, a date several months subsequent to the effective date of the amended version. We thus have quoted and applied the amended version, believing it to be the applicable provision.

The result would be the same, however, under the original version of the statute, which was enacted in 1963 and was in effect when plaintiff contracted with Associates and Associates performed its work for plaintiff. See Act of June 19, 1963, ch. 1030, § 1, 1963 N.C. Sess. Laws 1300, 1300-01; *Lamb, supra*, 308 N.C. at 426, 302 S.E. 2d at 872. Regardless of which version of G.S. 1-50(5) applies, then, the statute by its terms bars the action.

C. Associates has contended that G.S. 1-15(c) is the applicable statute. This statute establishes an outer limit of "four years from the last act of the defendant giving rise to the cause" for commencement of actions "for malpractice arising out of the performance of or failure to perform professional services." G.S. 1-15(c). Because G.S. 1-50(5) applies to the fact situation presented, see *Lamb, supra*, and because by its terms it applies, when applicable, "to the exclusion of G.S. 1-15(c)," G.S. 1-50(5)g, we believe G.S. 1-15(c) to be inapplicable. Again, however, assuming the contrary, the result is the same, and plaintiff's action against Associates remains barred by the express terms of the statute.

D. Plaintiff contended in the trial court, and contends on appeal, that if G.S. 1-15(c) is deemed to apply to its claims, that statute "is unconstitutional in that it violates Article I, Section 18 of the Constitution of North Carolina by denying Plaintiff's access to the Courts and . . . in that it violates the Fourteenth Amendment to the Constitution of the United States of America by de-

Square D Co. v. C. J. Kern Contractors

nying Plaintiff equal protection under the law." We have noted our belief that G.S. 1-15(c) is inapplicable, and that the 1981 version of G.S. 1-50(5) is the governing statute. The precise arguments made by plaintiff with regard to G.S. 1-15(c) were made with regard to the 1963 version of G.S. 1-50(5) in *Lamb, supra*. Our Supreme Court expressly and unanimously upheld the constitutionality of that statute against those arguments. *Lamb, supra*, 308 N.C. at 433-38, 440-45, 302 S.E. 2d at 876-79, 880-83. The reasoning of that decision is equally applicable whether applied to the 1963 version of G.S. 1-50(5), to its 1981 version, or to G.S. 1-15(c). Regardless of which statute controls, then, plaintiff's constitutional arguments cannot prevail in this jurisdiction.¹

VI.

For the foregoing reasons, the summary judgments in favor of Kern, the contractor, and Associates, the architect, are

Affirmed.

Chief Judge VAUGHN concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

A written contract that has the defendant's seal on it is some proof, it seems to me, that the contract is under seal. Plaintiff having produced such a contract, a factual issue was raised, I think, and its case should not have been dismissed on defendant's word that the seal did not mean what it appeared to. If a seal or any other part of a written contract has no *prima facie* standing until buttressed by a sworn affirmation that it truly represents or

1. The Supreme Court acknowledged in *Lamb* that there is a division of authority on the equal protection issue, and it cited cases *contra* its holding. See *Lamb, supra*, 308 N.C. at 437, 302 S.E. 2d at 878. For a contrary view on the constitutionality, under the "open courts" provision, of a "statute of repose" similar to those in question here, see this Court's opinion in *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E. 2d 188 (1981), *modified and affirmed*, 306 N.C. 364, 293 S.E. 2d 415 (1982). See also *Daugaard v. Baltic Coop. Bldg. Supply Assoc.*, 349 N.W. 2d 419 (S.D. 1984) (statutes of repose "unconstitutionally locked the courtroom door before appellants had an opportunity to open it" and "are violative of, and repugnant to, constitutional provisions insuring the citizenry of open courts").

Square D Co. v. C. J. Kern Contractors

expresses the intent of the parties, there would be little or no reason for using written or sealed contracts in the first place.

As to the statute of limitations or statute of repose issue, though the majority opinion is in accord with an unanimous decision of our Supreme Court, I nevertheless respectfully, but firmly, dissent. In my opinion, the General Assembly had no rational basis for immunizing architects and builders against all legal liability just six years after improvements are made to real estate. If G.S. 1-50(5) had been drafted to apply only to improvements that are expected to be used and whose defects usually become manifest within a few years, it perhaps could be rationally defended as being in the public interest. But there can be no possible justification, in my view, for exempting from liability after such a short period the builders and designers of bridges, skyscrapers, dams, factories, coliseums, school buildings, auditoriums, hotels, theaters, and other improvements to real estate that the public has every right to use in safety for much longer periods. While this case involves only a building wall that bulges, other cases, as is obviously foreseeable, will involve more dire consequences to property and human life alike; and to say that the potential producers of such destruction and damage can be absolved of liability even before the damage occurs is to render meaningless, at least to injured and damaged plaintiffs in civil litigation, the equal protection clauses of the federal and state constitutions and Article I, Section 18 of the North Carolina Constitution. This is not a permissible modification or substitution of a civil remedy—such as the Workers' Compensation Act—which due process under Article I, Section 18 permits in the progress and development of society; it is an abolition of accountability to the public for a special class, in exchange for which no one else in society gets anything whatever. And that some other states have done the same thing alters its character not a whit.

State v. Grier

STATE OF NORTH CAROLINA v. EUGENE ALEXANDER GRIER

No. 8326SC584

(Filed 21 August 1984)

1. Criminal Law § 66.15— pretrial photographic and lineup identifications— independent origin of in-court identification

An in-court identification of defendant by an assault victim was of independent origin and was not tainted by pretrial photographic or lineup identifications where the witness had ample time and opportunity to observe defendant at close range and in good light; although the witness was somewhat inaccurate in her description of defendant's age and the amount of facial hair he had, and had some difficulty in identifying defendant from photographic displays, she exhibited a high degree of certainty at the time she confronted defendant, identifying him almost immediately upon viewing the lineup; and only twenty-one days elapsed between the time of the offense and the pretrial identification.

2. Assault and Battery § 16.1— assault with deadly weapon with intent to kill inflicting serious bodily injury— evidence of injuries— submission of lesser offense not required

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury, the trial court did not err in refusing to instruct the jury on the lesser included offense of assault with a deadly weapon with intent to kill where the uncontradicted evidence showed that two victims were shot with a gun; their injuries required immediate hospitalization; each required subsequent surgery; each was unable to work for some time due to their injuries; and each suffered substantial pain and experienced at least temporary physical impairment.

3. Criminal Law § 138— severity of sentence— drug use— no consideration as mitigating factor

Although defendant presented no evidence of drug use at the time of the offense, the trial court could have inferred from the fact of the prior and subsequent use of addictive drugs that defendant was under the influence of drugs at the time of the offense and was attempting to rob his victim to support his drug habit; however, defendant presented no evidence demonstrating that his culpability for the offense was reduced due to his drug habit, and the trial court therefore was not required to consider that the drug use was a mitigating factor.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 29 November 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 January 1984.

On 23 August 1982, the Mecklenburg County grand jury returned indictments charging defendant, Eugene Alexander Grier,

State v. Grier

with robbery with a firearm and two counts of assault with a deadly weapon with intent to kill inflicting serious bodily injury. A jury found defendant guilty of the two assault charges and of attempted robbery with a firearm. Defendant was sentenced to twenty-eight years imprisonment on the attempted robbery conviction and to six years imprisonment on each of the assault convictions, with all sentences to run consecutively. From the verdict and sentences, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Fred R. Gamin, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

JOHNSON, Judge.

By his assignments of error, defendant presents three questions for review: (1) whether in-court identification of defendant was tainted by an impermissibly suggestive pretrial identification procedure; (2) whether the trial court erred in refusing to instruct the jury on the lesser included offense of assault with a deadly weapon with intent to kill; and (3) whether the trial court erred in failing to find as a mitigating factor that at the time of the offense, defendant suffered from a drug problem that was insufficient to constitute a defense but significantly reduced his culpability. For the reasons set forth below, we find no prejudicial error.

The State's evidence tended to show that on 23 July 1982, Amy Marie Bordonaro was employed as a secretary at Abernathy/Poetzsch Architects. Two black males entered the reception area of Abernathy/Poetzsch, walked within ten to fifteen feet of Ms. Bordonaro, and asked for directions. She later identified defendant as one of the two men.

As the two men were apparently preparing to leave, they turned back toward Ms. Bordonaro. At this time defendant produced a gun, pointed it at Ms. Bordonaro's waist, and demanded that she give him her ring. Defendant was then within arm's reach of Ms. Bordonaro. The lighting in the reception area was good and there was nothing obstructing defendant's face. Ms. Bordonaro testified that she had ample opportunity to view defend-

State v. Grier

ant, but admitted that she did not concentrate upon defendant's face for identification purposes.

After Ms. Bordonaro refused to surrender her ring to defendant, he struck her in the right eye, causing her to fall against a typewriter. She screamed and heard footsteps coming down the stairs into the reception area. Before she turned to run, Ms. Bordonaro saw defendant lift his arm toward the stairs and heard a shot fired. As Ms. Bordonaro ran toward another room, she heard another shot and felt pain in her left buttock, where she was struck by a bullet. She heard the two men leave a short time thereafter. Ms. Bordonaro originally testified that the men were in the office for forty-five minutes. Cross-examination tended to show that they were in the office only a few minutes. Ms. Bordonaro subsequently revised her testimony and claimed that the men were in her presence for fifteen minutes.

The State's evidence further showed that Mr. Michael Hill, an architect with Abernathy/Poetzsch Architects, heard Ms. Bordonaro scream and ran down the stairs into the reception area. Defendant pointed the gun at Mr. Hill's waist and fired, hitting Mr. Hill. Both Mr. Hill and Ms. Bordonaro were taken to the hospital with gunshot wounds.

I

[1] By his first assignment of error, defendant contends that the pretrial identification procedure was so impermissibly suggestive as to create a substantial likelihood of irreparably mistaken identification, and that the trial court therefore erred in denying defendant's motion to suppress Ms. Bordonaro's in-court identification testimony.

The evidence tended to show that in the hospital emergency room on 23 July 1982, Ms. Bordonaro gave only a general description of the suspects to the police officer. She described defendant's build and features, estimating that the gunman was 18 to 25 years old and had a dirty, unshaven appearance. At the time of his arrest, eight days later, defendant was thirty-five years old and had a very prominent moustache. In the emergency room, Ms. Bordonaro was shown two displays of six photographs of black males by a police officer. The defendant's picture was not in either of the photographic displays and Ms. Bordonaro did not

State v. Grier

positively identify anyone. Six days later, on 29 July 1982, Ms. Bordonaro was shown six photographs and again she made no positive identification. Defendant's photograph was in this display. On 30 July 1982, Ms. Bordonaro was shown two more displays of six photographs each. A photograph of the defendant was in one display. The defendant's photograph was the only one with writing at the bottom. The photograph was captioned "City Police, Charlotte, North Carolina 81-844." Defendant's name was on the back of the photograph, although both Ms. Bordonaro and the police officer present testified that Ms. Bordonaro did not view the backs of the photographs. Ms. Bordonaro hesitated at this photograph and indicated that it looked somewhat like the man in the office on 23 July 1982; but she did not positively identify anyone from the display.

On 13 August 1982, twenty-one days after the incident, Ms. Bordonaro observed a lineup of six black males at the Mecklenburg County Jail. Defendant was among the six men and his counsel was present and participated in the organization of the lineup. Ms. Bordonaro viewed the lineup for only a few seconds before positively identifying defendant, Eugene Alexander Grier, as the person who was in her office on 23 July 1982.

On 13 October 1982, defendant filed a motion to suppress the identification testimony of Ms. Bordonaro. A hearing was held on the motion immediately prior to trial on 17 November 1982. At the conclusion of the hearing, Judge Sitton denied the motion to suppress the identification testimony. He found, *inter alia*, that although Ms. Bordonaro testified that seeing the defendant in the lineup did help her somewhat in the in-court identification, she was, nevertheless, basing her in-court identification upon her observance of the person in her office on 23 July 1982. Based on the findings of fact, Judge Sitton concluded as a matter of law, *inter alia*, that there was "clear and convincing evidence [that] the in-court identification of the defendant is of original origin, based upon the witness's testimony of what she saw at the time of the crime, and is not tainted by any pre-trial identification procedure."

Defendant argues that the photographic display and physical lineup together constituted an impermissibly suggestive pretrial procedure. Defendant admits, however, that a pretrial identifica-

State v. Grier

tion procedure which is unduly suggestive does not require suppression of an in-court identification if the State shows that the in-court identification is independent of the suggestive procedure and is thus untainted by the pretrial identification procedure.

In *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980), the Supreme Court discussed the reliability of in-court identification testimony:

An improper out-of-court identification procedure requires suppression of an in-court identification unless the trial judge determines that the in-court identification is of independent origin. . . . The test to determine the validity of pretrial identification procedures under the due process clause is whether the totality of the circumstances reveals pretrial procedures so suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency, fairness, and justice. . . . Even if the pretrial procedure is invalid, the in-court identification will be allowed if the trial judge finds it is of independent origin. . . . After hearing the voir dire evidence, the trial judge must make findings of fact to determine whether the in-court identification meets the tests of admissibility. . . . The standards to be used to determine reliability of the identification are those set out in *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972)—(1) opportunity to view, (2) degree of attention, (3) accuracy of description, (4) level of certainty, (5) time between crime and confrontation. . . . If the findings of the trial judge are supported by competent evidence, they are conclusive on the appellate courts. (Citations omitted.)

Id. at 182-183, 270 S.E. 2d at 429.

We find that there was sufficient evidence for the trial court to conclude that the prosecutrix's in-court identification was of independent origin. Although Ms. Bordonaro was somewhat inaccurate in her description of defendant's age and the amount of facial hair that he had, the evidence showed that she nevertheless had ample time and opportunity to observe the defendant at close range and in good lighting. Ms. Bordonaro exhibited a high degree of certainty at the time she confronted defendant, identifying him almost immediately upon viewing the lineup. In addition,

State v. Grier

only twenty-one days had elapsed between the time of the offense and the pretrial identification.

In *State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975), the pretrial identification procedure was very similar to the procedure followed in this case. There, the prosecutrix viewed the defendant both in a photographic display and through a one-way mirror, but was unable to make a positive identification. One month later, she made a positive identification of the defendant from a lineup. *Id.* at 365, 215 S.E. 2d at 44. The Supreme Court concluded that the lapse of time did not destroy the reliability of the identification. *Id.* at 371, 215 S.E. 2d at 47. In *Hunt*, the pretrial identification was made one month and eleven days after the offense; here, the time lapse was just 21 days. In reviewing the length of the time lapse, as well as the other four factors from *Neil v. Biggers, supra*, we conclude that the trial court's finding, that the in-court identification was of independent origin, is supported by competent evidence. The trial court's finding is therefore conclusive on appeal. *State v. Clark, supra*. Accordingly, we find no prejudicial error in the admission of the in-court identification testimony.

II

[2] Defendant also assigns error to the trial judge's refusal to instruct the jury on the lesser included offense of assault with a deadly weapon with intent to kill.

Evidence as to the victim's injuries was uncontradicted and tended to show that Ms. Bordonaro was shot in the buttock with the bullet lodging in the front of her leg; that she was hospitalized the day of the shooting but released the next day; that she suffered great pain as a result of her injury; and that three months later she returned to have the bullet surgically removed from her leg. Ms. Bordonaro testified that initially she was unable to walk and was confined to a couch for at least a week and a half. At the time of the trial, she testified that she could not bend over or engage in certain recreational activities due to the injury to her muscle; however, the muscle was expected to heal in time.

Testimony indicated that Mr. Hill was shot in the abdominal area; that on the day of the shooting he was hospitalized and underwent surgery to repair a damaged colon and damaged

State v. Grier

nerves in his right leg; that one week later he underwent a second surgical operation to remove the bullet from his back; and that he suffered great pain as a result of the injury. He testified that he remained in the hospital for two weeks and at home recuperating for six weeks. Mr. Hill was still under a doctor's care at the time of the trial and testimony indicated that he had nerve damage in his right leg and pelvic area, preventing him from walking normally. However, there was no evidence to indicate that his condition would be permanent.

The trial judge instructed the jury as follows:

So, I charge that if you find from the evidence, beyond a reasonable doubt, that on or about July 23, 1982, Eugene Alexander Grier intentionally shot Amy Bordonaro with a pistol, and that Eugene Grier intended to kill Amy Bordonaro and did seriously injure her, it would be your duty to return a verdict of guilty of assault with a deadly weapon with intent to kill, inflicting serious injury. As to the serious injury, the Court instructs you that serious injury is such physical injury as causes great pain and suffering.

A similar instruction was given in regard to Mr. Hill and his injuries.

Where all the evidence tends to show that the accused committed the crime charged, and there is no evidence of guilt of a lesser included offense, the court is correct in refusing to charge the jury on the unsupported lesser offense. *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). Defendant does not contend that the injuries did not constitute serious bodily injury; he merely contends that the evidence of the injuries was insufficient to show serious bodily injury *as a matter of law*. However, the question presented by this assignment of error is not whether the evidence was sufficient to show serious bodily injury as a matter of law. Rather, the question is whether the State has produced positive evidence as to each and every element of the crime charged. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). Where there is evidence in support of each element, it is appropriate to submit the charge including serious bodily injury to the jury.

State v. Grier

Uncontradicted evidence showed that both victims were shot with a gun; that their injuries required immediate hospitalization; that each required subsequent surgery; that each was unable to return to work for some time due to their injuries; and that each suffered substantial pain and experienced at least temporary physical impairment. In *State v. Whitted*, 14 N.C. App. 62, 187 S.E. 2d 391 (1972), the State's evidence showed that the victim was shot in the abdomen with a pistol and blacked out; that he was immediately hospitalized; that he was subsequently readmitted to the hospital for surgery to repair damage caused by the bullet; that he was unable to walk by the time of the trial; and that his impairment was not necessarily permanent. *Id.* at 63, 187 S.E. 2d at 392. This Court found that although the trial court refused to rule that the injury was serious bodily injury as a matter of law, the question should have been submitted to the jury. In the case *sub judice*, where the injuries were very similar to those in *Whitted*, the question of serious bodily injury was correctly submitted to the jury. Moreover, defendant explicitly concedes that "the evidence of injuries . . . in this case was sufficient to submit the question of whether the injuries constitutes (sic) 'serious bodily injury' to the jury." Accordingly, we find no merit to defendant's assignment of error.

III

[3] Finally, defendant assigns error to the trial judge's failure to find as a mitigating factor that the defendant, at the time of the offense, "was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense." G.S. 15A-1340.4(a)(2)(d).

At the sentencing hearing, defendant introduced evidence that four to five months *prior* to the offense defendant was taking drugs and that exactly one month *after* the offense, tests by a drug rehabilitation center indicated that defendant had a substantial heroin and cocaine "habit." The State did not dispute this evidence. The trial judge found no mitigating factors and one aggravating factor and sentenced defendant to twenty-eight years of imprisonment for the attempted armed robbery conviction. The presumptive term for attempted armed robbery, a Class D felony, is twelve years. G.S. 15A-1340.4(f)(2); G.S. 14-87.

State v. Grier

Where evidence in support of a mitigating factor is uncontradicted, substantial and inherently credible, it is error for the trial court to fail to find that mitigating factor. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983); *State v. Winnex*, 66 N.C. App. 280, 311 S.E. 2d 594 (1984). The defendant has the burden of establishing mitigating factors by a preponderance of the evidence. *State v. Jones, supra*; *State v. Hinnant*, 65 N.C. App. 130, 308 S.E. 2d 732 (1983). He must convince the court that not only is the evidence uncontradicted, but also that "no reasonable inference to the contrary can be drawn," and that the credibility of the evidence 'is manifest as a matter of law.'" *State v. Jones, supra*, at 220, 306 S.E. 2d at 455, citing *North Carolina National Bank v. Burnette*, 297 N.C. 524, 536-537, 256 S.E. 2d 388, 395 (1979).

Uncontradicted evidence tended to show that defendant used drugs several months prior to the offense and had a heroin and cocaine "habit" just one month after the offense. Although defendant presented no evidence of drug use *at the time of the offense*, the trial court could have inferred from the fact of the prior and subsequent use of addictive drugs that defendant was under the influence of drugs at the time of the offense and was attempting to rob Ms. Bordonaro to support his drug habit. Nevertheless, defendant presented no evidence demonstrating that his culpability for this offense was reduced due to his drug habit.

In *State v. Salters*, 65 N.C. App. 31, 308 S.E. 2d 512 (1983), uncontradicted, credible evidence showed that the defendant was an alcoholic. However, the defendant did not allege or prove that his alcoholism in any way reduced his culpability for the offense. The court found that while a mental or physical condition may be capable of reducing a defendant's culpability for an offense, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor pursuant to G.S. 15A-1340.4(a)(2)(d). *Id.* at 36, 308 S.E. 2d at 516. In *Salters*, the court concluded that the defendant failed to establish the essential link between defendant's condition and his culpability for the offense. Therefore, the trial judge was not required to consider the condition as a mitigating factor. *Id.* This principle applies equally to drug use in the case *sub judice*. We find sufficient evidence in the record for the trial court to have concluded that defendant failed

Maintenance Service v. Construction Co.

to meet the burden of proof necessary for a finding that drug use significantly reduced his culpability for the offense. The balance struck by the trial judge will not be disturbed if there is significant support in the record for the sentencing determination. *State v. Davis*, 33 N.C. App. 262, 234 S.E. 2d 762 (1977). Therefore, it was not error for the trial judge to fail to find drug use as a mitigating factor.

For the above reasons, we find no merit to defendant's assignments of error. The judgment appealed from is

Affirmed.

Judges ARNOLD and PHILLIPS concur.

ALL IN ONE MAINTENANCE SERVICE, A NORTH CAROLINA GENERAL PARTNER-
SHIP v. BEECH MOUNTAIN CONSTRUCTION COMPANY

No. 8314SC673

(Filed 21 August 1984)

1. Corporations § 25— contract between parent corporation and third party— wholly-owned subsidiary bound by contract

Although it is ordinarily true that the doctrine of separate corporate entity would prevent a conclusion as a matter of law that, nothing else appearing, a wholly-owned subsidiary is intended to benefit from a contract executed between its parent corporation and another legal entity, plaintiff's own evidence in this case established that defendant subsidiary was intended to be the direct beneficiary of the release where such evidence tended to show that plaintiff did not have any separate contractual relationship with defendant's parent corporation or any other corporations named in the release; plaintiff did not contest the fact that the release related directly to the contractual relationship with defendant which was the subject of this lawsuit; and plaintiff's affiant specifically stated that the release was provided by defendant and that, by executing it, plaintiff intended to release defendant for work already performed.

2. Contracts § 4.1; Compromise and Settlement § 1; Accord and Satisfaction § 1— construction contract—release—consideration—summary judgment improper

In an action to recover the balance due under a written construction contract which defendant allegedly prevented plaintiff from completing, the trial court erred in entering summary judgment for defendant where a genuine issue of fact existed as to whether the parties intended a release to relate to

Maintenance Service v. Construction Co.

work already performed and therefore monies indisputably due, or to relate to the termination of the parties' contract and settlement of plaintiff's entitlement to the full contract price.

APPEAL by plaintiff from *Clark, Judge*. Judgment entered 14 March 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 11 April 1984.

The plaintiff, All In One Maintenance Service, instituted this action against the defendant by filing a complaint for breach of contract on 7 June 1982. The complaint alleged that defendant had prevented plaintiff from completing work under a written construction contract between the parties and sought recovery of the balance of the price due under the contract. The defendant, Beech Mountain Construction Company, filed an answer denying breach of contract and affirmatively pleading the defenses of release, compromise and settlement, and accord and satisfaction. The defendant also filed a request for admissions which was answered by the plaintiff.

On 30 December 1982, defendant filed a motion for summary judgment on the ground that there was no genuine issue of material fact requiring trial. In response, plaintiff filed an affidavit. After a hearing on the motion, the trial court granted summary judgment in favor of the defendant. Plaintiff appeals.

Fletcher, Maggiolo & Chaney, by Richard G. Chaney and Robert Maggiolo, for plaintiff appellant.

Powe, Porter and Alphin, by N. A. Ciompi, for defendant appellee.

JOHNSON, Judge.

The sole question presented by this appeal is whether the trial court erred in granting the defendant's motion for summary judgment on the ground that the release executed by the plaintiff bars plaintiff's contract action or bars any recovery by the plaintiff as a matter of law. For the reasons set forth below, we hold that summary judgment was improperly granted in favor of the defendant, Beech Mountain Construction Company.

The evidentiary forecast showed that on or about 16 November 1981, the plaintiff, All In One Maintenance Service and

Maintenance Service v. Construction Co.

the defendant, Beech Mountain Construction Company, executed a written contract whereby plaintiff was to perform certain subcontracting services for the defendant, consisting mainly of construction and carpentry work. The contract provided for written notice to plaintiff of any defect in construction. The contract price agreed upon came to approximately \$14,000. Prior to completion of the work called for in the contract, plaintiff and defendant developed certain differences and their relationship deteriorated. Prior to termination of the parties' contractual relationship, plaintiff received \$3,521.81 for the work done to that date.

Plaintiff's complaint alleges that plaintiff attempted performance under the contract but that defendant, by its own actions, "made it impossible for the plaintiff to complete its contract" during the period from December, 1981 to February, 1982. Further allegations are to the effect that defendant never informed plaintiff in writing of any dissatisfaction with its performance; that plaintiff has been ready and able to complete the contract at all times since 16 November 1981; and that if defendant had not breached the contract, plaintiff would have been able to have completed the work contracted for and was therefore entitled to the balance due, which was \$10,565.63.

By its first defense, defendant admitted that written notice of dissatisfaction was not given to plaintiff; that defendant had "terminated its relationship" with the plaintiff; but denied that it had breached the contract and denied that but for its breach, plaintiff would have been able to complete its performance under the contract. By way of a further and affirmative defense, defendant alleged that during the course of plaintiff's performance, certain differences and disputes arose as to the quality of the work being performed, as to timetables for the delivery of materials and as to payment. Defendant alleged that oral notice of dissatisfaction was given but that ultimately the situation became "intolerable" and defendant decided to terminate its relationship with the plaintiff in early February, 1982. Defendant further alleged that it paid "certain sums of money" to the plaintiff in consideration for the termination of the relationship and that this release is an affirmative bar to plaintiff's contract claim.

Attached to the answer is a copy of the release agreement executed by the plaintiff through one of its general partners,

Maintenance Service v. Construction Co.

Greg W. Brown. The release is a standard form release which purported to "acquit, satisfy and forever discharge the said second party" from a variety of standard listed obligations including, but not limited to, "covenants, contracts, controversies, agreements, . . ." etcetera. Additional obligations typed onto the release are as follows: "including but not limited to real estate commissions, brokerage commissions, expenses, override bonuses, residual commissions, salaries or claims of any nature against the above listed companies."

The "above listed companies" which constitute the party of the second part under the release do not, however, include the defendant company. Rather, the companies appear as follows:

Beech Mountain Development Corp., Beech Mountain Properties, Inc., Real Estate Marketing Associates, Inc., Mountain Resorts Development, Inc.

Plaintiff, All In One Maintenance, is named as the party of the first part who was to receive \$1,100 from the listed companies "in consideration" for the release.

By way of response to requests for admissions filed by the defendant, the plaintiff admitted that the release was duly executed by Greg Brown, a general partner of All In One Maintenance, on 10 February 1982 and that the consideration recited in the document was in fact received by All In One Maintenance.

In support of its motion for summary judgment, defendant filed the affidavit of Jerome Bernstein, which stated that he is the president of Beech Mountain Development Corp., and that the construction company is a wholly-owned subsidiary of the development corporation. Further information about the intercorporate relationship between the parent corporation and its subsidiary is not alleged in the affidavit, nor is it provided elsewhere in either the record on appeal or in the briefs of the parties. However, the allegations contained in the defendant's affidavit as to that relationship were not challenged by the plaintiff.

Plaintiff, in response to the summary judgment motion, filed an affidavit by Robert O. Perry, another general partner in All In One Maintenance. Perry alleged that during the course of plaintiff's performance, defendant had become delinquent in making

Maintenance Service v. Construction Co.

payments to plaintiff pursuant to the schedule provided in their contract. After unsuccessfully requesting payment of the amount due by February, 1982, which was \$1,121.88, plaintiff notified the owner of the property under construction that defendant had not been paying plaintiff and that plaintiff intended to file a lien against the property.

Perry alleged that shortly thereafter, Gary Eidelstein forwarded plaintiff a check for \$1,121.87, along with a lien waiver release; at that time, defendant had not notified plaintiff that it intended to terminate the parties' contract. In the affidavit, Perry stated the following with regard to the intent of plaintiff in executing the release:

9. By executing the release, which was provided by the Defendant and was not previously negotiated between the parties, Plaintiff intended only to release Defendant from all claims then due to Plaintiff for work then done. There was no intention whatsoever on Plaintiff's part to release Defendant from the contract.

10. Plaintiff received nothing from Defendant for executing said release except the amount that was already due plaintiff for work done pursuant to the contract between Plaintiff and Defendant.

11. It was not until almost a month later that Defendant informed Plaintiff that Plaintiff would not be allowed to continue working pursuant to the contract.

The affidavit alleged further that it was the intention of all the principals of the plaintiff that the release only cover claims related to the work already performed.

Rule 56(c) of the Rules of Civil Procedure provides, in part, that summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). An issue is genuine if it may be maintained by substantial evidence. *Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E. 2d 405, 409 (1982); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E. 2d 897, 901, *reh'g*

Maintenance Service v. Construction Co.

denied, 281 N.C. 516 (1972). An issue is material if the facts alleged would constitute or would irrevocably establish any material element of a claim or defense. *Bernick v. Jurden, supra*, at 440, 293 S.E. 2d at 409. To prevail on its motion for summary judgment, defendant has the burden of establishing by uncontroverted evidence the absence of any genuine issue of material fact. *Id.*

Plaintiff contends that the evidentiary forecast raised issues of material fact with respect to the identity of the party entitled to benefit by plaintiff's release, the existence of new consideration to support the release, and the intention of the parties as to the effect of the release on their contractual relationship.

Plaintiff's first contention is that because the defendant, Beech Mountain Construction Company, is not named in the release, it may not claim to be a beneficiary of that agreement. Plaintiff argues that it did not release anyone other than the persons or entities named in the release and that "to hold otherwise as a matter of law would be to disregard the doctrine of corporation identity." In its brief, plaintiff continues its argument as follows: "Furthermore, Defendant-Appellee does not benefit even indirectly from the release, because its parent corporation had no obligation under the contract between Defendant-Appellant from which it could be released."

The foregoing argument has an undeniable surface appeal. However, it is one which quickly dissipates under closer inspection. First, plaintiff does not contend, nor would the record support such a contention, that it has *any* separate contractual relationship with defendant's parent corporation, or any of the other corporations named in the release, nor does plaintiff contest the fact that the release relates directly to the contractual relationship with the defendant that is the subject of this lawsuit. Therefore, it would appear that the disputed release could only relate to plaintiff's contractual relationship with the defendant itself. Furthermore, plaintiff's affiant, Robert O. Perry, specifically stated that the release *was provided by the defendant* and that by executing it, plaintiff intended to release *the defendant* for work already performed as of 10 February 1982.

[1] Although it is ordinarily true that the doctrine of separate corporate entity would prevent a conclusion as a matter of law

Maintenance Service v. Construction Co.

that, nothing else appearing, a wholly owned subsidiary is intended to benefit from a contract executed between its parent corporation and another legal entity, *see Glenn v. Wagner*, 67 N.C. App. 563, 313 S.E. 2d 832 (1984), plaintiff's own evidence establishes that the defendant was intended to be the direct beneficiary of the release. The omission of the defendant's name from a release that it prepared and sent to the plaintiff is certainly puzzling. However, under these factual circumstances, it is not a sufficient basis to support plaintiff's contention that the release was not effective as to the defendant. Therefore, no genuine issue of fact was raised as to whether Beech Mountain Construction Company was a party entitled to the benefit of the release executed by the plaintiff.

[2] However, the evidentiary forecast does raise an issue as to whether the release was supported by consideration and whether it was intended by the parties to terminate their relationship under the contract. To be valid, a release must be supported by new consideration. *See Hospital v. Stancil*, 263 N.C. 630, 139 S.E. 2d 901 (1965). In determining whether new consideration is present, the question is whether the value received by the releasor is a genuine compromise of a disputed claim or merely a payment of an amount indisputably due. *See Sloan v. Burrows*, 357 Mass. 412, 258 N.E. 2d 303 (1970). In other words, it must appear that there was new consideration for the payment of part in discharge of the entire amount owed. *See FCX, Inc. v. Oil Co.*, 46 N.C. App. 755, 266 S.E. 2d 388 (1980); *Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E. 2d 85 (1969).

By its affidavit, plaintiff raises the factual contention that the sum of money it admittedly received in conjunction with the release represented only the payment of an amount due for work already performed by plaintiff under the contract. Plaintiff's admission that the "consideration" recited in the release was in fact received by All In One Maintenance must be read in conjunction with the plaintiff's pleading and affidavit. The complaint seeks recovery for the balance due on the contract price. If, as plaintiff contends, the \$1,100 represents payment for an amount indisputably due, then a release from all future claims would fail for lack of new consideration. However, if the sum represents the new consideration for the release as defendant contends, a genuine issue of fact remains as to whether the parties both intended to

Maintenance Service v. Construction Co.

terminate the contractual relationship between them by virtue of the release.

The burden of proving the affirmative defenses of accord and satisfaction or of compromise and settlement was on the defendant. *See Lumber Co. v. Kincaid Carolina Corp., supra.* A compromise and settlement must be based upon a disputed claim; an accord and satisfaction may be based upon an undisputed or liquidated claim. *Id.*; 3 Strong's N.C. Index 3d, Compromise and Settlement, § 1, p. 132-133.

In this case, defendant has pleaded both defenses and has alleged the 10 February 1982 release in support thereof. Clearly, an issue has been raised as to whether the parties intended the release to relate to work already performed and therefore monies indisputably due, or to relate to the termination of the contract and settlement of plaintiff's entitlement to the full contract price. In its answer, the defendant has alleged that the relationship was terminated in early February, 1982, with the signing of the release. Plaintiff, to the contrary, alleged that termination did not occur until 5 March 1982. With respect to these matters concerning the intent of the parties in executing the release, the record is far from conclusive factually and does not establish that defendant was entitled to summary judgment as a matter of law. The many disputed questions of fact raised by the evidentiary forecast must be resolved by a trier of fact and are not appropriately settled by summary judgment. Accordingly, the judgment of the trial court is

Reversed.

Judges WELLS and BECTON concur.

Briggs v. Morgan

ROBERT KENNON BRIGGS, ADMINISTRATOR OF THE ESTATE OF DORRITT BRIGGS CANNADA, DECEASED v. JOHN ROBERT MORGAN AND CHAPEL HILL, NORTH CAROLINA

No. 8315SC938

(Filed 21 August 1984)

1. Automobiles § 61— pedestrian struck by backing truck—absence of back-up bell as negligence—sufficiency of complaint

Where plaintiff contended that defendants were negligent in failing to maintain a functional back-up bell on their garbage truck which ran over plaintiff's decedent, there was no merit to defendants' contention that the complaint gave them no notice of an allegation of negligence in regard to the back-up bell and that such evidence should be excluded.

2. Automobiles § 61; Customs and Usages § 1— back-up bell on garbage truck—industry custom and voluntary practice—evidence improperly excluded

In a wrongful death action where plaintiff alleged that defendants were negligent in failing to maintain a functional back-up bell on their garbage truck which ran over plaintiff's decedent, the trial court erred in granting defendants' motion in limine to exclude all evidence of industry custom and the defendant town's own voluntary safety practices with respect to back-up bells, since plaintiff was entitled to a jury determination of what the degree of care required of a reasonable person would be in these circumstances; the excluded evidence was relevant and admissible to show this standard of care; and deviation from the customary practice would be evidence of negligence to be used by the jury in determining the degree of care required.

APPEAL by plaintiff from *Barnette, Judge*. Order entered 5 May 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 5 June 1984.

This action arises from an automobile accident in which plaintiff's intestate, Dorritt Briggs Cannada, was killed. The fatal injury occurred when the decedent was struck and crushed by a garbage truck owned by defendant Chapel Hill, North Carolina (hereinafter defendant Chapel Hill) and operated by defendant John Robert Morgan. Robert Kennon Briggs, brother of the decedent and administrator of the Estate of Dorritt Briggs Cannada, instituted this action for wrongful death. The trial court granted defendant's Motion in Limine to exclude all evidence of defendant Chapel Hill's failure to maintain a warning device or "back-up bell" on the garbage truck. A jury found that defendants were not negligent in the operation of the garbage truck; the jury did not reach the issues of contributory negligence on damages. Judg-

Briggs v. Morgan

ment was entered on the verdict. From the verdict and judgment plaintiff appeals.

Arthur Vann and H. Wood Vann, for plaintiff appellant.

Spears, Barnes, Baker and Hoof, by Alexander H. Barnes and Craig Brown, for defendant appellee.

JOHNSON, Judge.

This is an action for the wrongful death of Dorritt Briggs Cannada. The issue presented for review is whether the trial court erred in excluding plaintiff's evidence of the custom of other garbage collectors and of the voluntary practice of defendant regarding the use of a warning device or "back-up bell" on garbage collection trucks. Plaintiff contended that defendants were negligent in failing to maintain a functional back-up bell on the garbage truck that ran over the plaintiff's decedent and sought to introduce evidence of the industry custom and the defendant's own voluntary safety practices to establish defendant's negligence in this instance. Defendants filed a Motion in Limine to exclude the evidence, contending that the complaint gave them no notice of an allegation of negligence in regard to the back-up bell and that the evidence was "irrelevant, immaterial and highly prejudicial" because they are not required by law to maintain a back-up bell on the garbage truck. The trial judge granted defendant's Motion in Limine without discussion. For the reasons set forth below, we hold that the exclusion of plaintiff's proofs constituted prejudicial error.

Undisputed evidence established that on the morning of 13 July 1981, defendant Morgan was operating a garbage truck owned and maintained by defendant Chapel Hill. On that morning defendant Morgan, an employee of defendant Chapel Hill, was acting within the scope of his employment. At approximately 5:30 a.m., defendant Morgan stopped in the driveway of the Happy Store, which is located on the east side of South Columbia Street in Chapel Hill, to collect a load of garbage. As he backed out of the driveway, onto South Columbia Street, the truck struck and crushed a pedestrian, Dorritt Briggs Cannada, who died immediately as a result of her injuries. Testimony was contradictory as to whether the decedent was struck while on the sidewalk or on the street.

Briggs v. Morgan

Defendant Morgan testified that before proceeding in reverse, he looked carefully, both left and right, and saw no cars or pedestrians approaching; that while he backed out of the Happy Store driveway he continually looked in the truck's side mirrors; and that these side mirrors reflected areas to the left and right of the rear of the garbage truck, but the driver could not see directly behind the garbage truck through any mirrors or windows. Defendant Morgan did recall feeling a slight bump as he backed out of the Happy Store driveway, but at that time he was unaware that the garbage truck had struck or crushed a pedestrian.

Pictures of the truck, and testimony by defendant and eye-witnesses, indicated that the garbage truck had approximately fifteen lights shining in the rear of the truck at the time of the accident. Witnesses testified that as the garbage truck moves in reverse it makes a moderately loud noise.

Plaintiff attempted to introduce into evidence testimony of the manager of the Happy Store. The manager, "a student of [the University of North Carolina at] Chapel Hill, [of] at least normal intelligence," testified that he observed the garbage truck backing out of the Happy Store driveway at an excessive speed. His testimony as to the speed of the truck was withheld from the jury over plaintiff's objections.

The trial judge denied a Motion in Limine by plaintiff to exclude evidence of plaintiff's alleged habit of jaywalking. One witness testified to seeing the decedent walking on the east sidewalk along South Columbia Street, the side on which the Happy Store is located, just before the accident. Other witnesses testified to the decedent's whereabouts before she reached South Columbia Street. No witness testified to seeing the decedent walk from the west sidewalk, diagonally into the street or into the Happy Store driveway on that morning, although three public safety officers of Chapel Hill testified that, on previous occasions, they had repeatedly observed the plaintiff jaywalking across South Columbia Street from the west sidewalk into the Happy Store driveway on the east side of the street. However, the most recent of these observations were made several months before the accident; none of these public safety officers saw the decedent on the morning of the accident.

Briggs v. Morgan

The trial judge instructed the jury on three issues:

- (1) Was the plaintiff's intestate injured and killed by the negligence of defendants?
- (2) Did the deceased, by her own negligence, contribute to her injury and death?
- (3) What amount of damages, if any, is the plaintiff entitled to recover?

The jury found that the decedent was not injured and killed by defendant's negligence and therefore did not reach the issues of contributory negligence and damages. Judgment was entered on the verdict on 5 May 1983.

[1] At the outset, we note that defendants did have sufficient notice of an allegation of negligence by plaintiff with regard to the back-up bell. Defendants contend that the complaint contained only factual allegations and failed to allege that the lack of a back-up bell was negligence and the proximate cause of the accident. Plaintiff's complaint alleged in pertinent part:

10. That [the garbage truck] owned by Chapel Hill, North Carolina was not equipped with a warning device which was suppose [sic] to indicate to others that the truck was in reverse motion. That further the plaintiff believes that said truck had been equipped with such a device, but [it] was defective on July 13, 1981 and as a matter of fact the warning device had been removed from the vehicle.

It is elementary that evidence not supported by factual allegations is properly excluded by the trial court. *See, e.g., Terrell v. Insurance Co.*, 269 N.C. 259, 152 S.E. 2d 196 (1967). However, under the "notice theory of pleadings" adopted by this jurisdiction, a pleading is adequate if it gives sufficient notice of the events and transactions which produced the claim, and enables the adverse party to: (1) understand the nature of the claim and the basis for it; (2) file a responsive pleading; and (3) get any additional information necessary to prepare for trial by using the rules for obtaining pretrial discovery. *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E. 2d 161, 167 (1970). *But see Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 312 S.E. 2d 405 (1984) (complaint alleging libel *per se* not sufficient to

Briggs v. Morgan

give notice of a claim based upon a publication capable of two meanings, one defamatory and the other not). The fact that defendants filed a Motion in Limine to exclude any evidence or argument regarding the back-up bell indicates that defendants had sufficient notice that the nature and basis of the claim was that they had been negligent in failing to maintain the back-up bell. The information in the Motion in Limine indicates that defendants had sufficient information with which to file a responsive pleading and begin pretrial discovery. We find that defendants had sufficient notice of the allegation of negligence to prevent exclusion of the evidence regarding the back-up bell.

[2] We turn next to plaintiff's contention regarding the admissibility of evidence of customary practice and voluntary policies of installing warning devices on garbage trucks.

Evidence of the usual and customary conduct of others in the community, under similar circumstances, is normally relevant and admissible as an indication of what the community regards as proper, and as a composite judgment as to the risks of the situation and the precaution required to meet the risks. Prosser, *The Law of Torts*, § 33, p. 166 (4th ed. 1971). As a general rule, that an activity is done without the customary precaution is evidence to be considered in determining negligence, although deviation from custom is not conclusive in itself. *Id.* at 168.

In *Leggett v. Thomas & Howard Co., Inc.*, 68 N.C. App. 710, 315 S.E. 2d 550 (1984), the plaintiff slipped, fell and fractured her hip while in the defendant's store. This Court held that the trial court erred in excluding evidence that similarly situated store operators in the area take certain precautions, which the defendant had failed to take, to avoid such accidents. In *Flying Service v. Thomas*, 27 N.C. App. 107, 218 S.E. 2d 203 (1975), the plaintiff introduced evidence as to the customary procedure for landing a given type of airplane at a certain airfield. This Court noted that although evidence of custom, general practice or optimum procedure is not conclusive as to the standard of reasonable care, deviation from such customary practices "is evidence of negligence to be used by the jury in determining what the ordinary degree of care required of a reasonable person would be in the same circumstances." *Id.* at 112, 218 S.E. 2d at 206. In each of

Briggs v. Morgan

these cases, the court held that evidence of custom should be considered by the jury.

In the case *sub judice*, plaintiff was prevented from introducing any evidence as to whether it is customary for similarly situated garbage collectors in the community to maintain back-up bells on garbage trucks. We find that plaintiff was entitled to a jury determination of what the degree of care required of a reasonable person would be in these circumstances.

In addition, the evidence of defendant's own voluntarily adopted safety procedures was improperly excluded. The Director of Public Works for the Town of Chapel Hill testified, in the judge's chambers, that back-up bells were voluntarily installed on all city-owned garbage trucks; that Chapel Hill had a "policy" to install back-up bells on the garbage trucks; that the purpose of this policy or requirement was to alert pedestrians, for their safety, that the trucks were in reverse; and that at the time of the accident the back-up bell had been removed from the garbage truck in question for repair.

Defendant cites the general proposition that voluntary safety codes or policies, which have not been given compulsory force by the legislature, whether issued by government agencies or voluntary safety councils, are not admissible in evidence. *Sloan v. Light Co.*, 248 N.C. 125, 102 S.E. 2d 822 (1958); *Swaney v. Steel Co.*, 259 N.C. 531, 131 S.E. 2d 601 (1963). This same contention was raised in *Slade v. Board of Education*, 10 N.C. App. 287, 178 S.E. 2d 316, *cert. denied*, 278 N.C. 104, 179 S.E. 2d 453 (1971). In that case the defendant had voluntarily adopted certain safety policies and procedures, published in a handbook for bus drivers, to insure the safety of children riding in school buses. The court admitted the handbook into evidence, holding, *inter alia*:

[W]here it appears that defendant has voluntarily adopted the rules or safety standards as a guide for the protection of the public, they are admissible as some evidence that a reasonably prudent person would adhere to their requirements. . . . The book obviously set forth the rules and standards of conduct which defendant instructed its drivers to follow in order to protect passengers and the public. They are defendant's rules and standards. It is universally held that a defend-

In re Superior Court Order

ant may not complain about the introduction in evidence of its own relevant rules of conduct. (Citations omitted.)

Id. at 296, 178 S.E. 2d at 322. We find no principled distinction between a handbook containing safety rules and testimony by the Director of Public Works outlining the town's rules and policies for pedestrian safety. Therefore, this evidence was improperly excluded.

Plaintiff contends that evidence of the decedent's alleged habit of jaywalking was improperly admitted. This issue involves the allegation of contributory negligence, which the jury never reached. Therefore, it is not properly on appeal. Furthermore, because we find reversible error in the exclusion of evidence of the back-up bell, which requires that we remand for a new trial, we need not reach other issues plaintiff raises in his assignments of error.

The judgment below is reversed and remanded for a new trial in accordance with this opinion.

Reversed and remanded.

Judges WEBB and PHILLIPS concur.

IN RE SUPERIOR COURT ORDER DATED APRIL 8, 1983

No. 8318SC590

(Filed 21 August 1984)

1. Constitutional Law § 21— corporation ordered to produce documents—no constitutional right to privacy

A corporation has only a limited right to object to process for production of documents on Fourth Amendment grounds, and even if the trial court's order did affect the constitutional privacy interests of respondent corporation's customers in this case, respondent had no standing to contest that any such interests had been violated.

In re Superior Court Order

2. Banks and Banking § 3— criminal investigation of customer—duty to disclose records—order of confidentiality

Nothing in the common law prohibits an order requiring production of bank records as part of an investigation of criminal activities of the bank's customers, and the Superior Courts of North Carolina continue to possess such power where the interests of justice so require; moreover, it is within the court's authority to order that examination of the records remain confidential.

APPEAL by respondent from *Walker, Russell G., Jr., Judge*. Order entered 8 April 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 April 1984.

In furtherance of a criminal investigation the State petitioned the Superior Court of Guilford County for an order requiring respondent corporation NCNB National Bank of North Carolina (hereinafter "NCNB") to disclose its records pertaining to one of its customers. The State gave as grounds simply that it had "reason to believe" that the examination of the records "would be in the best interest of justice." Relying on the verified petition, and finding as fact that the best interest of law enforcement and justice so required, the court ordered NCNB to make the requested copies available to the State. Pursuant to the State's request for confidentiality, the court also ordered that NCNB withhold disclosure of the examination for 90 days. NCNB appeals.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Higgins, for the State.

Smith, Moore, Smith, Schell & Hunter, by Benjamin F. Davis, Jr., for respondent appellant.

JOHNSON, Judge.

[1] NCNB challenges the order on a number of grounds. We dispose first of the constitutional arguments it attempts to bring forward. It is well established that a corporation such as NCNB has only a limited right, not applicable here, to object to process for production of documents on Fourth Amendment grounds. *California Bankers Assoc. v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed. 2d 812 (1974). Even if we were to find the order affects the constitutional privacy interests of NCNB's customers, which it does not, *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48

In re Superior Court Order

L.Ed. 2d 71 (1976), it is clear that NCNB has no standing to contest that any such interests have been violated. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978), *reh'g denied*, 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed. 2d 83 (1979). NCNB's constitutional contentions, couched in its argument that the State must show some probable cause to obtain disclosure, must therefore be rejected.

We note that Congress has re-established, since *Miller, supra*, a certain degree of privacy in bank records, by passage of the "right to Financial Privacy Act of 1978." 12 U.S.C. § 3401 *et seq.* (1982). That Act prohibits access by Government authorities to financial records in the manner sought here. 12 U.S.C. §§ 3402, 3403 (1982). The Act applies only to agencies or departments of the United States, however, not the State of North Carolina. 12 U.S.C. § 3401(3) (1982). *See Suburban Trust Co. v. Waller*, 44 Md. App. 335, 408 A. 2d 758 (1979) (bank disclosure case merely citing federal Act as reflective of policy).

NCNB focuses the bulk of its argument on the lack of statutory authority for issuance of the order. It is true that no statute specifically authorizes issuance of an order to examine bank records. Even though, as we have noted above, neither the bank nor the customer has a constitutionally protected expectation of privacy in the bank records, there is however little effective procedure for law enforcement officials to examine bank records at the investigatory stage of a proceeding. Subpoenas are not available by statute until an action has been commenced. G.S. 15A-802; G.S. 1A-1, Rule 45 (may only issue in a pending cause). Obviously, at the investigatory stage there is insufficient evidence to support a finding of probable cause, and administrative or criminal search warrants cannot be used. G.S. 15-27.2; G.S. 15A-241 *et seq.* The grand jury does have power to initiate an investigation for which no bill of indictment has been submitted, but only if it finds probable cause for the charges. G.S. 15A-628(a)(4). Accordingly, the only statutory avenue open to the prosecutor in a case such as this is to prepare a bill of indictment without probable cause, submit it to the grand jury and obtain subpoenas in the hope that the witness(es) would provide sufficient probable cause to bring the investigation to a successful close. *See* G.S. 15A-623, 15A-626, 15A-628. This would necessarily involve the burdensome examination of numerous records, in this case some 3,400, before the

In re Superior Court Order

grand jury. There is apparently no prohibition against resubmitting the same information on a new bill of indictment, other than the roadblocks to investigation outlined above and the obvious expense and delay of again reviewing large numbers of financial records before the grand jury. *See* G.S. 15A-629.

However, the existence of some statutory procedure does not preclude other procedure. Where the General Assembly has expressly and constitutionally mandated certain procedures, and where the situation before the court constitutes one triggering that procedure, the court of course has no power to do otherwise. *In re Greene*, 297 N.C. 305, 255 S.E. 2d 142 (1979) (judge could not continue judgment on DUI conviction where statute expressly and unequivocally required sentencing). However, there is nothing in the statutes *prohibiting* the procedure employed here; nor is the procedure established by the grand jury provisions exclusive.

The courts of general jurisdiction of North Carolina, including the Superior Court, unless specifically denied them by statute, retain the powers inherent in them at common law. *English v. Brigman*, 227 N.C. 260, 41 S.E. 2d 732 (1947). They are not restricted solely to those enumerated by statute. Thus, for example, the Supreme Court has held that even though G.S. 15A-957 limited the Superior Court's *statutory* authority to transfer venue, the court retained its *inherent* authority to make transfers beyond those allowed by statute where the interests of justice so required. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050, *reh'g denied*, 448 U.S. 918, 65 L.Ed. 2d 1181, 101 S.Ct. 41 (1980); *see also* R. Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 20-23 (1974) (other examples of inherent powers).

We have researched the common law and discover in it nothing barring production of records in the manner presented here. Under the English law, first the Star Chamber and later Parliament arrogated to themselves virtually unlimited search powers; in fact, the "general writs" issued thereunder were a primary grievance of the revolting colonists. *See Boyd v. United States*, 116 U.S. 616, 626-629, 6 S.Ct. 524, 530-532, 29 L.Ed. 746, 749-751 (1886); 1 W. LaFave, *Search and Seizure* § 1.1 at 1-3 (1978). However, the adoption of the Fourth Amendment altered the

In re Superior Court Order

common law with respect to the rights of persons suspected or accused of crime, not of impartial corporations. A careful reading of Justice Bradley's exhaustive opinion in *Boyd, supra* (often described as "the leading Fourth Amendment case," see LaFave, *supra*, at 6), makes this clear.

[2] Corporations such as NCNB have never possessed the kind of Fourth Amendment protection accorded to persons and their homes. See *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906). Corporations' special status as creatures of the state exposes them to exhaustive state scrutiny in exchange for the privilege of state recognition. *Id.* at 74-75, 26 S.Ct. at 379, 50 L.Ed. at 665; *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950) (even "official curiosity" may justify inspection). A moment's reflection on the historical circumstances during the common law period probably explains the common law's silence on the right of corporations to object to requests for examinations of their records: (1) corporations were not such a prevalent form of business organization and (2) exhaustive records as we know them today were probably kept, if at all, only by the government. Accordingly, we conclude that nothing in the common law prohibits an order requiring production of bank records as part of an investigation of criminal activities of the bank's customers, and, if anything, the common law courts affirmatively possessed such power. By extension, then, the Superior Courts of North Carolina continue to possess such power where the interests of justice so require. *State v. Barfield, supra*.

This conclusion is supported by several recent decisions of this Court. We have upheld the issuance of compulsory process under the inherent power where the statutory scheme failed to explain the procedure for determining when the Superior Court may compel disclosure of privileged information. *In re Mental Health Center*, 42 N.C. App. 292, 256 S.E. 2d 818, *disc. rev. denied*, 298 N.C. 297, 259 S.E. 2d 298 (1979). In two other cases, the admission of evidence obtained by orders virtually identical to that used in the present case was upheld. *State v. Overton, Smedley, Ruviwat, and Atkinson*, 60 N.C. App. 1, 298 S.E. 2d 695 (1982), *disc. rev. denied and appeal dismissed*, 307 N.C. 580, 299 S.E. 2d 652 (Overton); 307 N.C. 581, 299 S.E. 2d 653 (Smedley); 307 N.C. 581, 299 S.E. 2d 652 (Ruviwat); 307 N.C. 578, 299 S.E. 2d 651 (Atkinson) (1983); *State v. Sheetz*, 46 N.C. App. 641, 265 S.E. 2d

In re Superior Court Order

914 (1980). *Sheetz* in particular is apposite: in that case, upon an affidavit equally devoid of factual allegations, the Superior Court issued an "Order for Examination of Business and Bank Account Records." We approve the admission of evidence thus obtained from the banks, distinguishing it from evidence obtained from the individual. We approved admission of evidence obtained under similar circumstances in *Overton*, *supra*.

In addition, policy supports our decision in several ways. First, as noted above, procedure before the grand jury is unwieldy and perhaps inconclusive. The bank will probably be less inconvenienced by an on-premises examination by investigators as opposed by production in court of all records, without prior knowledge of (1) their contents or (2) the likely utility of their production. The cost to the public thus will remain relatively low. The order for examination can be accompanied by instructions for confidentiality in order to prevent flight or destruction of evidence. Compare G.S. 15A-623(f) (allowing sealing of indictments), with 12 U.S.C. § 3409 (1982) (federal policy allowing delayed notice). And, finally, NCNB would enjoy no more protection from arbitrary demands for production were subpoenas to be required. These ordinarily issue upon request, without any showing of cause, and are subject to being quashed only in the discretion of the court. G.S. 1A-1, Rule 45. As the present case demonstrates, NCNB has received at least equal opportunity to be heard and contest the order under the chosen procedure.

We also conclude that the court did not act improperly in ordering that the examination remain confidential. There appears to be no constitutional bar to such an order. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed. 2d 608 (1979) (no right to publicity beyond that afforded accused by Sixth Amendment). In fact, similar orders are allowed by federal statute, 12 U.S.C. § 3409 (1982), and case law. *In re Swearingen Aviation Corp.*, 605 F. 2d 125 (4th Cir. 1979). North Carolina law does not appear to establish a stricter standard. No right of a defendant to be heard before the court, nor of the public to hear the final judgment of the court, was abridged. See *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977). Counterbalancing such considerations are the law enforcement interests in confidentiality outlined above, and the fact that failure of confidentiality may tend to foil the efficient administration of justice with which the court is charged.

In re Superior Court Order

Accordingly, NCNB's second assignment of error is also overruled.

We find that the court had authority to issue the order, and no abuse of process in its issuance is apparent, when compared with the information submitted to the court in *Sheetz, supra*. However, in future cases of this type it will undoubtedly facilitate review and increase cooperation on the part of those examined if the State makes a more complete statement of the circumstances underlying its petition and the reasons the administration of justice requires an order allowing examination.

NCNB contends briefly that compliance with the order will constitute an undue burden because of the costs involved. It appears from an affidavit in the record that the State has already agreed to limit its examination to a smaller number of records, and it is possible that subsequent negotiation may result in further reductions in cost of examination. NCNB has not requested payment of its costs from the court. See G.S. § 1A-1, Rule 45(c)(2) (court may award costs of production). Under the circumstances, and in light of the facts that any expression of opinion on this issue by this Court would be purely advisory, we choose not to address it at this time.

The order appealed from is accordingly

Affirmed.

Judges HEDRICK and HILL concur.

Blanton v. Sisk

C. D. BLANTON AND WIFE, VIRGINIA S. BLANTON; JOSEPHINE BLANTON; EMILY T. BLANTON; NANCY B. NAHIKIAN AND HUSBAND, HOWARD M. NAHIKIAN; AND C. D. BLANTON, EMILY T. BLANTON AND JOSEPHINE BLANTON, AS TRUSTEES OF THE RICHARD F. BLANTON TRUST v. JERRY W. SISK AND WIFE, JUDITH C. SISK; DOUGLAS HENSON AND WIFE, GLENDA J. HENSON; LYNDON W. SISK AND WIFE, ANNA L. SISK

No. 8329SC537

(Filed 21 August 1984)

1. Mortgages and Deeds of Trust § 32.1— second purchase money deed of trust—anti-deficiency judgment statute inapplicable

G.S. 45-21.38, the anti-deficiency judgment statute, does not apply to a holder of a second purchase money deed of trust or mortgage whose security has been destroyed as a result of foreclosure by a holder of a first purchase money mortgage or deed of trust.

2. Attorneys at Law § 7.4— notice of intent to collect fees

In an action to recover an amount allegedly due on a promissory note executed by defendants, the trial court erred in entering summary judgment awarding plaintiffs attorneys' fees, since defendants did not receive notice of plaintiffs' intent to collect attorneys' fees as required by G.S. 6-21.2(5), and notice was not given when plaintiffs served their complaint upon defendants.

APPEAL by defendants from *Burroughs, Judge*. Judgment entered 11 April 1983, in Superior Court, MCDOWELL County. Heard in the Court of Appeals 3 April 1984.

Plaintiffs instituted this civil action to recover from the defendants \$44,400.00 plus interest, the amount allegedly due on a promissory note executed by the defendants. Both plaintiffs and defendants filed motions for summary judgment based on the pleadings and affidavits. From the order granting summary judgment in favor of plaintiffs, defendants appealed.

Dameron and Burgin, by E. Penn Dameron, Jr., for plaintiff appellees.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Albert L. Sneed, Jr., for defendant appellants.

JOHNSON, Judge.

On 6 October 1980, plaintiffs conveyed a tract of land owned by them and located in Marion, North Carolina, to the defendants. The purchase price was \$78,000.00 with \$22,500.00 payable at closing and the balance of \$55,500.00 to be paid over a five-year

Blanton v. Sisk

period in annual increments of \$11,100.00. As security for the balance of the purchase price, the defendants executed and delivered to plaintiffs a promissory note in the amount of \$55,500.00 bearing interest at 10% per annum.

Subsequent to the sale, defendants conveyed the tract of land purchased from plaintiffs to Marion Properties, Inc., a corporation wholly owned by the defendants. On 21 May 1981, Marion Properties, Inc., obtained a construction loan in the amount of \$466,000.00 from Asheville Federal Savings & Loan Association (hereinafter Asheville Federal). At the request of the defendants, plaintiffs agreed to subordinate their deed of trust to the deed of trust from Marion Properties, Inc. to Asheville Federal. Thereafter, the property was improved with condominiums which Marion Properties, Inc. proposed to sell for profit.

In the spring of 1982, Marion Properties, Inc. defaulted in the payment of its indebtedness to Asheville Federal, and on 21 July 1982, Asheville Federal foreclosed on its deed of trust. At the ensuing foreclosure sale, the property was purchased by Asheville Federal for \$400,000.00, resulting in a deficit of \$87,305.90 on the deed of trust foreclosed. Plaintiffs, whose deed of trust was not in default at the time of the sale by Asheville Federal, received none of the proceeds from the sale.

[1] The primary question presented by this appeal is whether the holder of a second purchase money mortgage or deed of trust can sue on the note after the security has been destroyed by foreclosure of a senior lien for an amount less than what was necessary to satisfy the senior lien. Defendants vigorously contend that suit on the note by the holder of a second purchase money mortgage or deed of trust is barred by G.S. 45-21.38 as construed in *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979). We disagree.

Ordinarily, a creditor secured by a mortgage or deed of trust on real property may recover the full amount of the debt. He may realize the security or he may bring an action on the note or other obligation, or both. However, the rights of a holder of a purchase money mortgage or deed of trust to enforce such a debt are restricted by the anti-deficiency judgment statute, G.S. 45-21.38, which provides:

Blanton v. Sisk

Deficiency judgments abolished where mortgage represents part of purchase price.—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

Thus, by statutory provision, at foreclosure, the holder of a purchase money mortgage or deed of trust is limited to the recovery of the security or to the proceeds from the sale of the security. *Realty Co. v. Trust Co.*, *supra*, at 370, 250 S.E. 2d at 273. The holder is prohibited from ignoring his security and bringing an *in personam* action against the mortgagor on the note secured by the deed of trust. *Id.* at 373, 250 S.E. 2d at 275. *Bank v. Belk*, 41 N.C. App. 356, 363, 255 S.E. 2d 421, 426, *cert. denied*, 298 N.C. 293, 259 S.E. 2d 911 (1979). The holder of a purchase money mortgage or deed of trust is, also, prohibited from bringing an *in personam* suit after foreclosure to recover a deficiency. *Realty Co. v. Trust Co.*, *supra*, at 373, 250 S.E. 2d at 275. In fact, our Supreme Court has stated, unequivocally, that “the manifest intention of the Legislature [in codifying G.S. 45-21.38] was to *limit the creditor to the property conveyed* when the note and mortgage or deed of trust are executed to the seller of the real estate . . .” (emphasis ours). *Id.* at 370, 250 S.E. 2d at 273. The restrictions of G.S. 45-21.38, as construed by *Realty Co.*, clearly apply to the foreclosing mortgagee and to the note foreclosed. Neither the

Blanton v. Sisk

statute nor *Realty Co.*, however, addresses the question of whether the holder of a second mortgage or deed of trust, whose security has been destroyed as a result of foreclosure by a senior holder of a purchase money mortgage or deed of trust, can bring an *in personam* action for the debt. Indubitably, the status of a holder of a second purchase money mortgage or deed of trust, who does not realize the security or any of the proceeds from the foreclosure sale, is that of an unsecured creditor. As a general rule the anti-deficiency statute does not apply to actions by unsecured creditors. *Brown v. Owens*, 251 N.C. 348, 350, 111 S.E. 2d 705, 707 (1959). Indeed, our Supreme Court, in addressing this same question, held that G.S. 45-21.38 does not bar an *in personam* action by a holder of a second purchase money deed of trust when the security for the debt has been exhausted by foreclosure of a first purchase money mortgage or deed of trust. *Brown v. Kirkpatrick*, 217 N.C. 486, 487, 8 S.E. 2d 601, 602 (1940). In *Brown v. Kirkpatrick*, the Court reasoned:

It is apparent that this statute does not by its terms prohibit the holder of a note, though secured by a second deed of trust, from obtaining judgment on the note when the property has been sold under another deed of trust having priority of lien. The statute applies only to the holders of notes "secured by such deed of trust," that is the deed of trust under which the security was foreclosed and the land sold. It refers to the "obligation secured by the same." The holder of the note secured by the first deed of trust upon foreclosure, presumably, will receive satisfaction of his note from the sale, or he can protect himself by purchase of the land. *But the holder of the note secured by the second deed of trust, who receives nothing, or an insufficient amount, from the sale, finds himself without security. In this situation the Court will not extend by judicial interpretation the provisions of the statute, and deny him the right to judgment for a valid debt.* (Emphasis ours.)

217 N.C. at 487-488, 8 S.E. 2d at 602.

Our Supreme Court has never overruled or modified this central ruling in *Brown v. Kirkpatrick*, that the anti-deficiency statute does not apply to a holder of a second purchase money mortgage or deed of trust whose security has been exhausted. In

Blanton v. Sisk

fact, *Realty Co.*, which broadly interprets the anti-deficiency judgment statute, contains no express disapproval of *Brown v. Kirkpatrick*. Thus, we reaffirm the Court's ruling in *Brown v. Kirkpatrick*, and we hold that G.S. 45-21.38 does not apply to a holder of a second purchase money deed of trust or mortgage whose security has been destroyed as a result of foreclosure by a holder of a first purchase money mortgage or deed of trust. Accordingly, we affirm that portion of the trial court's order entering summary judgment for plaintiffs in the amount of \$50,980.93, which represents the balance due on the promissory note plus interest, thereon.

[2] The defendants also contend that the trial court erred by awarding to the plaintiffs attorneys' fees. They argue that the award of attorneys' fees was erroneous because they did not receive notice of plaintiffs' intent to collect attorneys' fees as required by G.S. 6-21.2(5). We agree.

G.S. 6-21.2(5) provides in pertinent part that:

The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, *notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees.* If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions. (Emphasis ours.)

The statutory use of "shall" renders the provision requiring notice mandatory. Although the form of notice required is not specified by the statute, it is clear that the notice must be writ-

Blanton v. Sisk

ten and that such notice must advise the debtor of his right under G.S. 6-21.2(5) to pay the outstanding balance on the note without incurring attorneys' fees. Notwithstanding the clear language of the statute, plaintiffs argue that notice for the purposes of 6-21.2(5) was given when they served their complaint upon the defendants. We do not find any authority in support of this contention in our State court jurisdiction, and plaintiffs direct us to none. However, the Fourth Circuit Court of Appeals in responding to this same contention, has ruled that the filing of a claim in bankruptcy does not satisfy the requirements of G.S. 6-21.2(5). *ITT-Industrial Credit Co. v. Hughes*, 594 F. 2d 384, 387 (4th Cir. 1979). Hence, we are of the view, buttressed by *ITT-Industrial*, that the serving of the complaint upon the defendants seeking to recover attorneys' fees does not satisfy the requirements of G.S. 6-21.2(5). Plaintiffs' affidavits and pleadings in support of their motion for summary judgment, do not include a sworn statement or other evidence establishing compliance with G.S. 6-21.2(5). Thus, plaintiffs' own evidence and the forecast of defendants' evidence, establish that there is no genuine issue of material fact as to plaintiffs' failure to give notice as required by G.S. 6-21.2(5), and that defendants are entitled to judgment on this issue as a matter of law. For this reason, summary judgment on the issue of attorneys' fees should have been granted to the defendants. Accordingly, we hold that the portion of the court's Order granting summary judgment in favor of plaintiffs on the issue of attorneys' fees was improper. The judgment of the trial court awarding to the plaintiffs attorneys' fees is reversed, and this cause is remanded to the trial court with instructions for entry of summary judgment for defendants on this issue.

Affirmed in part; reversed and remanded in part.

Judges HEDRICK and HILL concur.

Minor v. Minor

PAULETTE FARRINGTON MINOR v. RANDOLPH MINOR

No. 8315SC478

(Filed 21 August 1984)

Divorce and Alimony § 17.3— possession of marital home as alimony

Plaintiff was entitled to summary judgment in her action to prevent defendant from interfering with her right of possession of the marital home, since, pursuant to the parties' earlier consent judgment, possession of the marital home was an award of alimony which would terminate upon remarriage, and this was true even though possession was not specifically denominated as "alimony" because the consent judgment responded to all other specific requests elsewhere; the award of possession of the marital home was intended to be alimony in response to that remaining specific request for relief; and there was no mention of child support in regard to the marital home.

APPEAL by defendant from *Preston, Judge*. Judgment entered 9 March 1983 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 13 March 1984.

Plaintiff, Paulette Farrington Minor, instituted this action on 4 December 1981 to prevent defendant, Randolph Minor, from interfering with her right of possession of the marital home in Alamance County. At the time the action was instituted, the defendant had exclusive title to the home and surrounding real property.¹

Plaintiff and defendant had been lawfully married on 10 June 1957. Two children were born of their union, the youngest of whom reached the age of eighteen on 23 July 1980. On 13 May 1977 the parties were separated and have since lived continuously separate and apart. Plaintiff instituted an action for: (1) divorce from bed and board; (2) alimony; (3) care and custody of the minor child; and (4) child support. That action terminated in a consent judgment, Case No. 77CVD1000, executed on 5 January 1978.

1. Plaintiff also alleged a second cause of action seeking to reform the deed to the real property. Plaintiff alleged that defendant obtained title to the property by a mistake which was induced by his inequitable and deceitful conduct. This issue has been settled by consent order requiring defendant to convey a one-half undivided interest in the property to plaintiff. The second cause of action is not before this Court for review.

Minor v. Minor

The consent judgment contained Findings of Fact as to: (1) jurisdiction; (2) marriage and separation; (3) plaintiff's fitness for care, custody and control of the minor child; (4) defendant's financial ability to provide child support; and (5) plaintiff's inability to bear litigation expenses. The consent judgment concluded, *inter alia*, that plaintiff was entitled to custody, care and control of the minor child and that she had demonstrated sufficient grounds for divorce from bed and board. Finally, the consent judgment ordered:

1. That the plaintiff is hereby granted custody, care and control of the minor child . . .
2. That the plaintiff shall have absolute and sole custody and possession of the parties' home occupied by the plaintiff and her minor child . . . together with and to include all furnishings, fixtures and household appliances.
- . . .
4. The defendant shall pay into the office of the Clerk of Superior Court the full sum of \$100.00 per month to be disbursed as child support. . . .

The possession of the home was not specifically denominated as child support with a stated termination date; nor was it identified as a response to plaintiff's prayer for alimony.

Later, a dispute developed between the parties as to the proper interpretation of the consent judgment. It is plaintiff's contention that the grant of custody and possession of the marital home was a lump sum alimony payment, while defendant contends that it was a form of child support which terminated when the youngest child reached eighteen. In consequence, this action was instituted by plaintiff to prevent defendant from interfering with her right of possession. Subsequently, defendant filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56. This motion was heard and denied on 23 August 1982. On 3 March 1983 and 4 March 1983, respectively, defendant and plaintiff each filed a motion for judgment on the pleadings, pursuant to G.S. 1A-1, Rule 12(c).

Judge Preston denied defendant's motion and granted plaintiff's motion for judgment on the pleadings, concluding as a mat-

Minor v. Minor

ter of law that possession of the marital home was a form of alimony which would terminate upon remarriage by the plaintiff. Defendant appeals from the entry of judgment on the pleadings for the plaintiff and from the denial of defendant's motion for summary judgment.

Lee W. Settle, for defendant appellant.

Ridge and Richardson, by Daniel S. Johnson, for plaintiff appellee.

JOHNSON, Judge.

The threshold question presented for review is whether judgment on the pleadings is appropriate in this action. G.S. 1A-1, Rule 12(c) provides that a motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. *Trust Co. v. Elzey*, 26 N.C. App. 29, 214 S.E. 2d 800, cert. denied, 288 N.C. 252, 217 S.E. 2d 662 (1975). The trial judge is to consider only the pleadings and any attached exhibits, which become part of the pleadings. *Wilson v. Development Co.*, 276 N.C. 198, 206, 171 S.E. 2d 873, 879 (1970); *Van Every v. Van Every*, 265 N.C. 506, 512, 144 S.E. 2d 603, 607 (1965); 10 Strong's N.C. Index 3d, Pleadings, § 38.4, p. 304-305. No evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings. *Wilson v. Development Co.*, *supra*, at 206, 171 S.E. 2d at 878; *Acceptance Corp. v. Spencer*, 268 N.C. 1, 13, 149 S.E. 2d 570, 579 (1966); 10 Strong's N.C. Index 3d, Pleadings, § 38.4, p. 305.

The record in this case, however, contains affidavits and indicates that the trial judge, in addition to considering the pleadings and attached exhibits, also heard counsel for both parties and considered briefs submitted by both parties. Therefore, the motion must be considered as though it was made under Rule 56. See G.S. 1A-1, Rule 12(c) (motion for judgment on the pleadings will be treated as motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court).

Minor v. Minor

G.S. 1A-1, Rule 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Summary judgment, like judgment on the pleadings, is appropriately granted only where no disputed issues of fact have been presented and the undisputed facts show that any party is entitled to judgment as a matter of law. *Bland v. Bland*, 21 N.C. App. 192, 203 S.E. 2d 639 (1974) (summary judgment); *High v. Parks*, 42 N.C. App. 707, 257 S.E. 2d 661, *disc. rev. denied*, 298 N.C. 806, 262 S.E. 2d 1 (1979) (judgment on the pleadings).

In this case, the rights and obligations of the parties are established by the consent judgment and the only dispute between the parties relates to the proper interpretation of its provisions. Such questions are appropriately addressed on motion for summary judgment. See *Bland v. Bland*, *supra*.

In essence, a consent judgment is a contract between parties entered upon the record with the approval and sanction of the court. *Id.* at 195, 203 S.E. 2d at 641. A consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties; it must be interpreted in light of the controversy and the purposes intended to be accomplished by it. *Id.* Where the language of the contract is plain and unambiguous, the construction of the agreement is a matter of law; the court may not ignore or delete any of its provisions, *nor insert words into it*, but must construe the contract as written, in light of undisputed evidence as to custom, usage and meaning of its terms. *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E. 2d 456, 457-458 (1975); 3 Strong's N.C. Index 3d, Contracts, § 12.1, p. 392.

This Court cannot insert the words "child support" into the plain and unambiguous language of the consent judgment. Defendant contends that the consent judgment awarded plaintiff the marital home as child support. To support his argument, defendant relies upon affidavits by himself and lawyers for both parties during the proceeding which terminated with the consent judgment. The affidavits attest to the affiants' beliefs that the award of the home was intended to be child support. However, these affidavits may not properly be considered in support of defendant's

Minor v. Minor

argument because the language of the consent judgment is plain and unambiguous.

In *Corbin v. Langdon*, 23 N.C. App. 21, 208 S.E. 2d 251 (1974), the plaintiff presented affidavits to show the practical interpretation given to an earlier contract between the parties involving the sale of a dentistry practice. The court concluded that any parol understandings regarding the interest of the parties merged into the writings. *Id.* at 26, 208 S.E. 2d at 254. Finding that the parties had ample opportunity to clearly express other interests but had failed to do so, the court refused to consider the affidavits as evidence manifesting an intent other than that expressed in their written agreement. *Id.* We find this principle of contract construction equally applicable in the case *sub judice*. We have examined the language of the parties' consent judgment itself to ascertain the intent of the parties and find no mention of child support in regard to the marital home. Significantly, another award is specifically entitled "child support." Under these circumstances, this Court cannot, under the guise of construction, insert the words "child support" in reference to the marital home when the parties have elected to omit them.

Moreover, although the consent judgment also failed to denominate possession of the marital home as "alimony," the circumstances surrounding the agreement reinforce that interpretation. G.S. 50-16.7(a) reads in relevant part: "In every case in which alimony or alimony pendente lite is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance." *See also* G.S. 50-13.4(e). Had the trial court specifically identified the possession of the marital home to be alimony, as it is directed to by the statute, this action might have been forestalled. However, the fact that the judgment granted child support in an express provision, separate from the award of possession of the marital home, indicates that the trial court and the parties intended the awards to be distinguished.

In addition, it may be inferred from the pleadings that the award of possession of the marital home was intended as a response to plaintiff's prayer for alimony. In the action resulting in the consent judgment, plaintiff asked for divorce from bed and board, custody of the minor child, alimony, and child support. Portions of the consent judgment specifically responded to plaintiff's

Minor v. Minor

requests for divorce, child custody and child support. Although the consent judgment did not expressly respond to the request for alimony, and no award was denominated as such, we cannot agree that no alimony was granted. There is no requirement that alimony be denominated as such for it to be a valid award of alimony. 2 Lee, N. C. Family Law, Alimony, § 135, p. 138. Furthermore, possession of real or personal property, including the marital home, is one form of alimony provided by statute. See G.S. 50-16.7(a)(c); *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980). Logic dictates the conclusion that because the consent judgment responded to all other specific requests elsewhere, the award of possession of the marital home was intended to be alimony, in response to that remaining specific request for relief.

Defendant further argues that the findings were insufficient to support an award of alimony. He asserts that there were no findings regarding the grounds for alimony. This contention is without merit. Every ground for divorce from bed and board also serves as a ground for alimony. See G.S. 50-16.2; G.S. 50-7. The trial court found that the parties were married and subsequently separated, and concluded that "the plaintiff had demonstrated to the Court sufficient grounds for divorce from bed and board." These findings and conclusion are sufficient to buttress an award of alimony.

Defendant also contends that the consent judgment did not award alimony because the parties were not identified as supporting or dependent spouses. However, defendant overlooks the fact that a consent judgment is a contract between parties. A finding of dependency is not required when a judgment ordering alimony is entered into by consent. *Cox v. Cox*, 36 N.C. App. 573, 245 S.E. 2d 94 (1978).

Finally, defendant challenges the trial court's conclusion that the alimony award would terminate upon remarriage. Alimony generally ends upon remarriage of the dependent spouse. 2 Lee, N.C. Family Law, Alimony, § 135.1, p. 146. Absent provisions to the contrary, the trial court did not err in concluding that the possession of the marital home was intended to be alimony which would terminate upon remarriage.

In conclusion, we hold that plaintiff was entitled to judgment as a matter of law and that the possession of the marital home

State v. Dow

was an award of alimony which would terminate upon remarriage. Although the trial court entered judgment as judgment on the pleadings, rather than summary judgment, we find that this error was not prejudicial. Therefore, the judgment appealed from is

Affirmed.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. THOMAS LEE DOW

No. 835SC957

(Filed 21 August 1984)

1. Narcotics § 4.3— constructive possession of marijuana—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for possession of marijuana with intent to sell and deliver, and there was no merit to defendant's contention that he was not in actual or constructive possession of the controlled substance found in the automobile in question where there was competent evidence that defendant had custody and possession of the borrowed automobile for three days prior to his arrest, was at all relevant times the custodian of the automobile, and was present in the vehicle when the controlled substance was found.

2. Larceny § 7.5— defendant as aider and abettor—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for larceny and possession of stolen goods where it tended to show that defendant drove the two men who actually committed the larceny to the scene of the crime; while the two men were stealing the property, defendant remained nearby in the automobile with the motor running; when the two men returned to the car with the stolen goods, defendant gave one man the car keys so the goods could be placed in the trunk; and defendant was driving the automobile containing the stolen goods and the perpetrators at the time of his arrest.

3. Larceny § 9— larceny and possession of same stolen goods—conviction for both offenses improper

Defendant could not properly be convicted of both felony larceny and possession of stolen goods.

APPEAL by defendant from *Stevens, Judge*. Judgment entered 24 February 1983 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 March 1984.

State v. Dow

Defendant was charged and convicted of felony larceny, felonious possession of stolen goods, and possession of marijuana with intent to sell and deliver. From judgments imposing active prison terms, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Shipman & Lea, by James W. Lea, III, for defendant appellant.

JOHNSON, Judge.

The evidence adduced at trial tended to show that on 23 November 1982, defendant, Thomas Dow, drove two men, Joe Harvin and Darryl Thompson, to the Sears store located in Independence Mall, Wilmington, North Carolina. Harvin and Thompson went into the store while defendant waited in the automobile with the motor running. A short time later, Harvin and Thompson returned to the automobile, walking very fast and carrying two chain saws which they placed in the trunk of defendant's automobile. Defendant left the scene of the crime with the two men and the chain saws. The three men drove to a house on Hanover Street where Harvin and Thompson removed the chain saws from the trunk and took them to the door of the house. Defendant remained in the automobile. Within a few minutes, they returned to the automobile and placed the chain saws on the rear seat. The three men then drove to a second house where Harvin got out while defendant and Thompson remained in the automobile. After Harvin returned to the automobile and as defendant began to drive away, a police officer arrived and signaled defendant to stop. On reaching the automobile, the officer observed two chain saws on the rear seat. Defendant was removed from the automobile and placed under arrest. While the officer was talking with defendant, several other officers arrived at the scene. One of the officers approached the automobile and asked Harvin to remain in the vehicle. At that time, the officer noticed three small manila envelopes on the rear floor of the automobile. The officer picked up one of the envelopes and examined the contents. As Harvin and Thompson were being removed from the vehicle, one of them lifted the right rear floor

State v. Dow

mat and revealed nine additional manila envelopes. The substance contained in the twelve envelopes was identified as marijuana.

At the close of the State's evidence, the defendant's motion for dismissal was denied. Defendant testified that the automobile belonged to his adult daughter and that it had been in his custody for approximately three days prior to his arrest. He stated that Harvin and Thompson paid him \$13.00 to drive them to Sears. He did not question them as to the nature of their business transaction at Sears. He also testified that the marijuana found in the automobile belonged to Harvin.

At the close of all the evidence, the defendant's motion for dismissal of all charges against him was again denied.

Defendant assigns error to the trial court's denial of his motions to dismiss made at the close of the State's evidence and at the close of all the evidence. He challenges the legal sufficiency of the evidence to go to the jury on each of the charges against him.

By presenting evidence at trial, defendant waived his right to assert the denial of his motion for dismissal at the close of the State's evidence as error on appeal. G.S. 15-173; *State v. Mendez*, 42 N.C. App. 141, 146, 256 S.E. 2d 405, 408 (1979). However, his motion made at the close of all the evidence draws into question the sufficiency of all the evidence to go to the jury. *State v. Stewart*, 292 N.C. 219, 223, 232 S.E. 2d 443, 447 (1977). On a motion to dismiss, the evidence is considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Simmons*, 57 N.C. App. 548, 550, 291 S.E. 2d 815, 817 (1982). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Summitt*, 301 N.C. 591, 600, 273 S.E. 2d 425, 430, cert. denied, 451 U.S. 970, 101 S.Ct. 2048, 68 L.Ed. 2d 349 (1981); *State v. Gray*, 56 N.C. App. 667, 672, 289 S.E. 2d 894, 897, disc. rev. denied, 306 N.C. 388, 294 S.E. 2d 214 (1982).

With these principles in mind, we now consider whether the evidence was sufficient to go to the jury on each of the three charges against defendant.

[1] Defendant argues, first, that the State's evidence on the charge of possession of marijuana with intent to sell and deliver

State v. Dow

was insufficient. He contends that there was no evidence that he was either in actual or constructive possession of the controlled substance found in the automobile. We disagree.

A defendant has possession of a controlled substance when he has both the power and intent to control its disposition or use. *State v. Summers*, 15 N.C. App. 282, 283, 189 S.E. 2d 807, 808, *cert. denied*, 281 N.C. 762, 191 S.E. 2d 359 (1972). Possession may be either actual or constructive. *State v. Crouch*, 15 N.C. App. 172, 174, 189 S.E. 2d 763, 764, *cert. denied*, 281 N.C. 760, 191 S.E. 2d 357 (1972). Constructive possession exists when there is no actual personal dominion over the controlled substance, but there is an intent and capability to maintain control and dominion over it. *State v. Spencer*, 281 N.C. 121, 129, 187 S.E. 2d 779, 784 (1972); *State v. Crouch, supra*, at 174, 189 S.E. 2d at 764-765.

Had the defendant, in the instant case, owned the automobile, an inference that he was in constructive possession of the controlled substance found therein would have been permissible. *State v. Glaze*, 24 N.C. App. 60, 64, 210 S.E. 2d 124, 127 (1974). An inference of constructive possession can also arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found. In fact, the courts in this State have held consistently that the "driver of a borrowed car, like the owner of the car, has the power to control the contents of the car." *Id.* at 64, 210 S.E. 2d at 127; *State v. Wolfe*, 26 N.C. App. 464, 467, 216 S.E. 2d 470, 473, *cert. denied*, 288 N.C. 252, 217 S.E. 2d 677 (1975). Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury. *See State v. Harvey*, 281 N.C. 1, 13, 187 S.E. 2d 706, 714 (1972).

In this case, there was competent evidence that the defendant had custody and possession of the borrowed automobile for three days prior to his arrest. There was evidence that the defendant was, at all times relevant herein, the custodian of the automobile and was present, therein, when the controlled substance was found. Therefore, the defendant's control of the premises where the controlled substance was found was sufficient to require submission of the issue of possession to the jury.

State v. Dow

[2] There was also ample evidence to warrant submission of the case to the jury on the charges of larceny and possession of stolen goods. A defendant may be found guilty of an offense under the principles of acting in concert if he is:

present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979). A defendant may, also, be found guilty of an offense by reason of aiding and abetting if he:

accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense.

State v. Price, 280 N.C. 154, 158, 184 S.E. 2d 866, 869 (1971); *State v. Pryor*, 59 N.C. App. 1, 7, 295 S.E. 2d 610, 615 (1982).

Applying these principles to the evidence adduced at trial, we think a jury could reasonably find that defendant committed the offenses of larceny and possession of stolen goods by reason of aiding and abetting or acting in concert. The evidence at trial tended to show that defendant drove the two men who actually committed the larceny to the scene of the crime. There was eyewitness testimony that while the two men were actively stealing the property, defendant remained nearby in the automobile with the motor running. There was also testimony that when Harvin and Thompson returned to the automobile with the stolen goods, defendant gave Thompson the car keys and the goods were placed in the trunk. There was also evidence that defendant was driving the automobile containing the stolen goods and the perpetrators at the time of his arrest. Moreover, there was uncontroverted evidence that the stolen goods were found on the rear seat of the automobile with which they were linked by the eyewitness. Based on the foregoing, a jury could reasonably conclude that defendant, together with his accomplices, committed the of-

State v. Dow

fenses of larceny and possession of stolen goods. Accordingly, we hold that the evidence in this case was legally sufficient for the jury to have concluded that defendant committed the offenses charged in the indictment. This assignment of error is without merit.

[3] By his second assignment of error, defendant contends that the court erred in denying his motion to arrest judgment. He contends that he should not have been convicted of both felony larceny and possession of stolen goods. We agree.

We find *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982), dispositive of this issue. In *Perry*, the Supreme Court concluded that the legislature did not intend to punish a defendant for both larceny of the property and possession of the same property which he stole. *Id.* at 234-235, 287 S.E. 2d at 816. The Supreme Court held that "though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses." *Id.* at 236-237, 287 S.E. 2d at 817. *See also*, *State v. Andrews*, 306 N.C. 144, 291 S.E. 2d 581, *cert. denied*, 459 U.S. 946, 103 S.Ct. 263, 74 L.Ed. 2d 205 (1982). Although the trial judge in the case *sub judice* consolidated the verdicts in the larceny and the possession of stolen goods cases for sentencing, the defendant's convictions in *both* cases are in contravention of the "bright line" rule of *Perry*. Since the defendant can only be convicted of either the larceny or the possession of stolen property, judgment must be arrested in one of the two cases. In determining which of the judgments should be arrested, we are guided by *State v. Pagon*, 64 N.C. App. 295, 307 S.E. 2d 381 (1983). In *Pagon*, this Court held:

that where judgment must be arrested upon one of two sentences of equal severity because of a double jeopardy violation, the sentence which appears later on the docket, or is second of two counts of a single indictment, or is the second of two indictments, will be stricken.

Id. at 299, 307 S.E. 2d at 384. Applying this rule and the "bright line" rule of *Perry* to the case *sub judice*, we vacate judgment on the conviction of felonious possession of stolen goods.

Bare v. Wayne Poultry Co.

Error is also assigned to portions of the jury instructions. Our careful examination of the jury instructions in their entirety reveals that the instructions substantially reflect the law arising on the evidence in this case. Hence, this assignment of error is without merit.

As to the conviction of possession of marijuana with intent to sell and deliver: No error.

As to the conviction of felonious larceny: No error.

As to the conviction of possession of stolen property: Judgment vacated.

Judges HEDRICK and HILL concur.

SARAH M. BARE, EMPLOYEE-PLAINTIFF v. WAYNE POULTRY COMPANY, EMPLOYER, AND AETNA CASUALTY AND SURETY INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 8310IC234

(Filed 21 August 1984)

1. Master and Servant § 94— workers' compensation—horseplay—findings supported by evidence

In an action to recover for an injury sustained by plaintiff during horseplay while on the job, evidence was sufficient to support the Commission's finding of fact that it was customary for defendant's processing line employees to play around with each other with their chicken deboning knives and that this activity was apparently condoned by the employer, since the evidence tended to show that all the employees occasionally played around with their knives; a supervisor constantly kept his workers in view; and nothing was said or done by the employer to prevent the horseplay.

2. Master and Servant §§ 56, 57— workers' compensation—injury sustained during horseplay—causal connection between employment and injury—injury covered

There was no merit to defendants' contention that the horseplay which led to plaintiff's injury put her beyond the protection of the Workers' Compensation Act, since plaintiff was injured on a chicken deboning processing line by a deboning knife in the hand of a fellow employee also working on the line and the causal connection between the employment and injury was thus very plain;

Bare v. Wayne Poultry Co.

being cut by a chicken deboning knife was not a hazard that plaintiff shared equally with the rest of the laboring force nor was the injury one that could have just as readily been sustained elsewhere away from the job; and that plaintiff's participation in the horseplay that led to her injuries was both foolish and negligent was irrelevant because fault is not a factor under the Workers' Compensation Act, and it does not exclude workers otherwise covered because they were engaged in foolishness or horseplay when injured.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 15 December 1982. Heard in the Court of Appeals 8 February 1984.

Plaintiff seeks to recover Workers' Compensation for an injury sustained while in the employ of the defendant Poultry Company. Deputy Commissioner Shuping, following a hearing, denied plaintiff's claim. His key findings and conclusions were that while plaintiff was injured during the course of her employment, the injury did not arise out of her employment, but rather arose out of "the sportive acts, conduct and/or horseplay" of plaintiff and a fellow employee. On appeal, the Full Commission interpreted the evidence differently and concluded that though the injury occurred during the course of horseplay with a co-employee, it nevertheless arose out of and in the course of plaintiff's employment, and awarded benefits to her.

The evidence before both the Deputy Commissioner and the Full Commission showed that: Plaintiff and James Anderson were chicken deboners in defendant employer's plant, and worked next to each other on the processing line. In doing their work they used knives that had blades approximately 5 inches long and 1/2 inch wide. On 7 August 1981, while both employees were at their places on the processing line and doing their work, Anderson mentioned how shabby his apron looked and plaintiff stated that she would take care of it for him and reached over and playfully cut the strings to Anderson's apron with her knife. In retaliation, Anderson tried to cut plaintiff's apron, but missed, and plaintiff then ripped Anderson's apron. Anderson, again trying to cut plaintiff's apron, cut her thigh instead, causing plaintiff to be disabled for a time, incur medical expenses, and have a scar approximately eight inches long. Playing around with their knives on the processing line was a common practice of the employees, and the Commission found that this practice was apparently condoned by the employer.

Bare v. Wayne Poultry Co.

Gardner, Gardner, Johnson, Etringer & Donnelly, by Walter J. Etringer, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan, for defendant appellants.

PHILLIPS, Judge.

[1] Though the main question for determination is whether plaintiff is barred from Workers' Compensation benefits because she was injured while participating in horseplay with a fellow employee, we address first the defendants' only other contention: That there is no support in the evidence for the Full Commission's finding of fact that it was customary for the processing line employees to play around with each other with their chicken deboning knives and this activity was apparently condoned by the employer. Concerning this, plaintiff's testimony was as follows:

Q. Was it usual to be talking and joking around on the line?

A. Un-hunh. People have always done it, talking to each other.

* * *

Q. Before this occasion had you ever played around with other workers with a knife in your hand?

A. Yes. Everybody does.

The testimony of the employer's supervisor for the part of the processing line where plaintiff and four others worked in a close little group, according to him, indicated that the processing line employees were under constant supervision. He testified that he observed the line every day and knew where the workers were standing "at all times," and that they moved around very little. But neither he nor anyone else testified, as the Commission noted, either that playing around with knives on the processing line was not a common practice, or that the company did not know about it, or that it was forbidden by the company, or that anything had ever been done to prevent it. In our judgment, the evidence described, along with the employer's silence in regard to it, adequately supports the findings made. If all the processing line employees occasionally played around with their knives, as

Bare v. Wayne Poultry Co.

the testimony positively states, a supervisor that constantly kept his workers in view could not have avoided seeing the playing around each time it happened; and that nothing was said or done to prevent it justified the Commission inferring that the company was not concerned about it. Thus, for the purposes of this appeal, the findings are conclusive. *Mitchell v. Board of Education*, 1 N.C. App. 373, 161 S.E. 2d 645 (1968).

[2] The defendants' contention that the horseplay which led to plaintiff's injury put her beyond the protection of our Workers' Compensation Act cannot be accepted. The Act applies to all injuries sustained by covered employees, with certain exceptions irrelevant to this case, which occur by accident "arising out of and in the course of the employment," G.S. 97-2(6), and in our judgment plaintiff's award was not erroneously made. In general, the phrase "in the course of" refers to the time, place and circumstances under which an accident occurs; and since plaintiff's injury occurred during the hours of employment, at the place of employment, while she was engaged in the performance of her duties, the injury therefore occurred "during the course" of the employment, as both the Deputy Commissioner and the Full Commission found. *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668 (1949). And, in general, the term "arising out of" refers to the origin or causal connection of the accidental injury to the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977). For an accident to "arise out of" an employment, there must be some causal connection between the employment and the injury. *Bolling v. Belk-White Co.*, 228 N.C. 749, 46 S.E. 2d 838 (1948). Since plaintiff was injured on a chicken deboning processing line, by a chicken deboning knife in the hand of a fellow employee also working on the line, the causal connection between the employment and the injury could hardly be plainer, whether the company condoned the workers playing around with knives on the line or not. Being cut by a chicken deboning knife was not a hazard that plaintiff shared equally with the rest of the laboring force; nor was the injury that she sustained one that could have just as readily been sustained elsewhere, away from the job. *Vause v. Vause Farm Equipment Co., Inc.*, 233 N.C. 88, 63 S.E. 2d 173 (1951). And that the plaintiff's participation in the horseplay that led to her injuries was both foolish and negligent is beside the point, we think, since fault is not a factor under the Workers'

Bare v. Wayne Poultry Co.

Compensation Act and it does not exclude workers otherwise covered because they were engaged in foolishness or horseplay when injured.

The Workers' Compensation Act is a compromise arrived at through the concessions of employees and employers alike. *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266 (1930). Nothing in it supports the notion that it was enacted just for the protection of careful, prudent employees, or that employees that do not stick strictly to their business are beyond its protection. By its terms, with certain exceptions irrelevant to this case, the Act applies to all employees who work for employers with the requisite number of employees and are injured by accident during the course of and arising from their employment; and it is not required that the employment be the sole proximate cause of the injury, it being enough that "any reasonable relationship to the employment exists, or employment is a contributory cause." *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E. 2d 476, 479 (1960). Though the Act is silent as to employees who participate in tomfoolery, it expressly excludes employees who are injured or killed as a proximate result of being under the influence of an intoxicant, unless the employer furnishes it; being under the influence of a controlled substance not prescribed by a practitioner; and of intentionally and willfully undertaking to kill himself or another. G.S. 97-12. If we should add horseplay voluntarily participated in by the claimant to this exclusionary list, as the defendants urge us to do, it would be a judicial interpolation that we are neither empowered nor inclined to make.

Nor do we accept defendants' contention that injuries resulting from horseplay initiated and participated in by a claimant have already been excluded from our Workers' Compensation Act by the decision of our Supreme Court in *Chambers v. Union Oil Company*, 199 N.C. 28, 153 S.E. 594 (1930). Our understanding of that case is otherwise. In *Chambers*, the plaintiff truck driver was accidentally shot by a pistol that a fellow truck driver carried in his work and mishandled, and the Court's decision was that the "sky-larking" or horseplay defense recognized by some jurisdictions did not apply to the circumstances of that case, since the plaintiff was an innocent bystander and did not participate in any sky-larking that may have occurred. Indeed, it is not clear that sky-larking or horseplay (generally understood, according to the

Bare v. Wayne Poultry Co.

opinion, to mean fooling around that is independent of and disconnected from the work) was even done by the fellow employee. The facts stated in the opinion indicate that the fellow worker simply mishandled the gun either in showing it to the plaintiff or in tossing it into the seat of his nearby truck; and the main thrust of the decision was that the negligence of the fellow servant is no defense to a Workers' Compensation claim. In all events, it is clear that the decision in that case is no precedent for this one, though in quoting from and discussing what annotators and other courts had said about the so-called horseplay defense, it was possibly implied that participators in horseplay were excluded from the workers' compensation law. But that question was not before the Court, and in quoting from and discussing decisions and writings from elsewhere, the Court also said some things that can fairly be construed to mean that the horseplay defense is a hypocritical evasion of the rule that contributory negligence and the negligence of fellow servants have no place in Workers' Compensation litigation. Because of the opinion's wide range, both parties rely on it and quote from it in their briefs. The defendants were encouraged by the following (199 N.C. at 32-33, 153 S.E. at 596-597):

The author of the annotation in 13 A.L.R., 540, says: 'It is generally held that no compensation is recoverable under the Workmen's Compensation Acts, for injuries sustained through horse-play or fooling which was done independently of and disconnected from the performance of any duty of the employment, since such injuries do not arise out of the employment within the meaning of the acts.' Numerous cases are cited from various jurisdictions in support of the principle of law so announced. In the same note the author continues the discussion as follows: 'But in a number of cases an exception to the general rule has been recognized, and the right to compensation sustained, where an employee, who was injured through horse-play or fooling by other employees, took no part in the fooling, but was attending to his duties.' Numerous cases are cited in support of this proposition.

Bare v. Wayne Poultry Co.

It is generally conceded by all courts that the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery. In other words, a workman is entitled to recover irrespective of fault if the injury arises out of and in the course of the employment. The doctrine of horse-play, which excludes a workman from compensation, although he is not at fault, and does not engage therein, is inconsistent with the underlying philosophy of compensation acts, which are designed for the very purpose of eliminating fault as a basis for determining liability.

And the plaintiff saw comfort in this (199 N.C. at 31, 153 S.E. at 595-596):

It is a self-evident fact that men required to work in daily and intimate contact with other men are subjected to certain hazards by reason of the very contact itself because all men are not alike. Some are playful and full of fun; others are serious and diffident. Some are careless and reckless; others are painstaking and cautious. The assembling of such various types of mind and skill into one place must of necessity create and produce certain risks and hazards by virtue of the very employment itself.

. . . .

[T]he fact remains that the bulk of normal American workmen possess a stratum or residuum of vivacity and good nature which frequently manifests itself in joking and harmless pranks. These things are not unnatural, but natural and the ordinary outcropping of industrial contact between men of all classes and types. Such risks, therefore, are incident to the business and grow out of it.

Though neither statement quoted from the opinion in *Chambers* has precedential value for this case, the latter is nevertheless useful to us for its proper and insightful recognition that the workers' compensation system is based upon the realities of human conduct, and that workers occasionally relieving the tedium of their labors by sportive and foolish acts is a routine and accepted incident of employing them. While some courts, as the decision indicates, have devised complex and intricate rules pertaining to horseplay [see 1A Larson, *The Law of Workmen's*

Knott v. Washington Housing Authority

Compensation § 23:20 (1982)], we do not believe that the circumstances of this case either justify or require such a step by us. What the circumstances do require, we think, is simply a holding that plaintiff's award must be affirmed, since the record shows that her injuries occurred during the course of and arose from her employment. To hold otherwise would not give the Act the liberal construction that our Courts have stated time and time again is required; but would, it seems to us, interpolate into the Act an exclusionary provision that the General Assembly has not seen fit to enact.

Affirmed.

Judges WELLS and BRASWELL concur.

PAULINE M. KNOTT v. WASHINGTON HOUSING AUTHORITY OF THE CITY
OF WASHINGTON, NC

No. 832DC1008

(Filed 21 August 1984)

1. Easements § 5.3— easement implied from prior use—sufficiency of evidence

Evidence was sufficient to support the trial court's conclusion that plaintiff had an easement implied from prior use in an alley which bordered her property where the evidence tended to show that a conveyance from one of plaintiff's predecessors to another of her predecessors amounted to a separation of title with regard to the land on either side of the alley in question; this alley constituted the only means of ingress to and egress from the property prior to the separation of title; an implied easement was created at the time of separation of title; the alley continued to serve plaintiff's predecessors as the sole means of reaching the property; and plaintiff herself and her tenants used the alley for access to the property for a period of seven years.

2. Damages § 5; Evidence § 45— closing of alley—damages—opinion evidence of value

Where plaintiff claimed that she had obtained an easement in an alley and alleged that defendant had closed the alley in violation of her rights, the trial court did not err in finding that plaintiff was damaged in the amount of \$4,876.80, though the only evidence regarding value was the testimony of plaintiff's son that the value of his mother's property was \$16,256.00 prior to the closing and \$11,379.20 immediately after the closing, since the correct measure of damages was the difference in the fair market value of the land immediately before and after the taking; the value of the use of property may be

Knott v. Washington Housing Authority

proved by opinion evidence of witnesses acquainted with the property and the facts bearing upon its use; plaintiff's son managed his mother's property and visited the land about four times per year; and he was familiar with the sales prices of adjacent lots.

3. Judgments § 55— date of damage unknown—no pre-judgment interest

Where plaintiff could not actually pinpoint the date on which her property was damaged for the purpose of measuring interest and she submitted the date on which her action was filed as the date from which interest would be tolled, the trial court did not err in concluding as a matter of law that it could not properly sign and enter a judgment allowing pre-judgment interest.

APPEAL by defendant from *Hardison, Judge*. Judgment entered 21 March 1983 in District Court, BEAUFORT County. Heard in the Court of Appeals 7 June 1984.

Between 1954 and 1970 plaintiff acquired three contiguous tracts of land on West Fifth Street in the City of Washington, North Carolina. West Fifth Street in the vicinity of plaintiff's property is also U.S. Highway 264, a four-lane undivided paved road. All of the tracts were conveyed to plaintiff by Emma Foreman and Addie Foreman Harris and her husband Edgar Harris from a larger tract.

The first lot acquired by plaintiff in 1954 began on the northern edge of West Fifth Street and was roughly 47.5 feet wide and 47 feet deep. In order to build a dwelling on the lot, plaintiff found it necessary to purchase an additional six foot strip on the east and north sides. In 1970 plaintiff acquired the third tract in order to provide access and space for parking. This lot, which was 53.5 feet wide and 41 feet deep, connected the land previously purchased with a lane or cartway known as Cherry's Alley. Cherry's Alley ran in a generally east-west direction parallel with West Fifth Street to an intersection with Washington Street. It was at one time part of a larger parcel of land owned by Adam Cherry.

In 1978 defendant began a slum clearance and redevelopment project in an area north of Cherry's Alley. The project involved the acquisition by eminent domain of certain parcels of land north of Cherry's Alley. The area was later subdivided by defendant and sold to a third person who graded and landscaped the lots for residential construction.

Knott v. Washington Housing Authority

Robert Smaw became plaintiff's tenant in the house on West Fifth Street in 1970. In order to reach the house, Smaw would drive his car to his backyard by way of Cherry's Alley, which he would enter from its intersection with Washington Street. There was no room at the front of the house on West Fifth Street to park a car, and there was no room on the sides of the house for a car to be driven around it. In late 1977 or early 1978 the developer of the lots north of plaintiff's property plowed up the alley and instructed Smaw not to use it anymore.

On 25 September 1980 plaintiff filed a declaratory judgment action in which she alleged that the only means of ingress and egress to and from her property was along Cherry's Alley eastwardly to Washington Street. She further claimed that she had obtained an easement in the alley and alleged that defendant completely closed and obliterated the alley in violation of her rights.

After hearing all the evidence, the trial court found that plaintiff had an easement in Cherry's Alley and that defendant's act of destroying the alley had damaged plaintiff in the amount of \$4,876.80. From these proceedings defendant appeals.

Gaskins, McMullan and Gaskins, by Herman E. Gaskins, Jr., for defendant appellant.

Wilkinson and Vosburgh, by James R. Vosburgh, for plaintiff appellee.

ARNOLD, Judge.

[1] Defendant contends that the trial court erred in finding that plaintiff had an easement along Cherry's Alley to Washington Street. We disagree and find that the evidence does show that plaintiff had an implied easement in the alley.

Although easements must generally be created in writing, courts will find the existence of an easement by implication under certain circumstances. J. Webster, *Real Estate Law in North Carolina*, § 280 at 346 (1971). Easements are implied in two basic situations. In the first, an "easement by necessity" may be found, typically when land becomes landlocked after a sale or transfer. In the second situation, more applicable to the case at bar, an "easement from prior use" may be implied "to protect the prob-

Knott v. Washington Housing Authority

able expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer." P. Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary,"* 58 N.C.L. Rev. 223, 224 (1980). We find that there exists competent evidence in the record to support a finding that plaintiff obtained an easement implied from prior use.

The author in the above mentioned article describes what he sees as a typical example of an easement implied from prior use, stating that it "begins with a landowner who builds and uses a driveway from the public road. Later he sells a portion of the land served by the driveway but retains title to the driveway itself. The purchaser, who knew of the driveway at the time of the transfer, may have reasonably assumed that the driveway would continue to serve his land, regardless of whether his land had some other access to the public road." *Id.* This "typical" example closely resembles the facts of the case at bar.

An easement implied from prior use is generally established by proof: (1) that there was common ownership of the dominant and servient parcels and a transfer which separates that ownership; (2) that, before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous and permanent; and (3) that the claimed easement is "necessary" to the use and enjoyment of the claimant's land. See *Glenn, supra* at 225, and *Dorman v. Ranch, Inc.*, 6 N.C. App. 497, 170 S.E. 2d 509 (1969).

Moreover, the element of necessity does not require a showing of absolute necessity. "It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same degree which his grantor had used it, because such use was reasonably necessary to the 'fair' . . . , 'full,' . . . 'convenient and comfortable,' . . . enjoyment of his property." *Smith v. Moore*, 254 N.C. 186, 190, 118 S.E. 2d 436, 438-39 (1961) (citations omitted).

Applying these principles to the facts before us, we find that the evidence is sufficient to establish an easement implied from prior use in Cherry's Alley. The first link in plaintiff's chain of title is a deed to Adam Cherry by Margaret Taylor dated 30 Oc-

Knott v. Washington Housing Authority

tober 1876. The property conveyed was a single tract constituting 2 5/6 acres and lying both north and south of Cherry's Alley. The next conveyance in the chain is a deed from Adam Cherry to Champ Shields dated 25 October 1895. The description shows that the lot conveyed became landlocked as a result of the conveyance, except for the cartway adjoining it to the north. The lot is described as adjoining the lands of Rebecca Bryant on the west; a lane or cartway on the north; and the lands of Adam Cherry, the grantor, on the east and south. This lane or cartway, now known as Cherry's Alley, clearly provided Champ Shields with the only means of ingress to and egress from the lot conveyed. Moreover, since the conveyance from Adam Cherry to Champ Shields amounted to a separation of title with regard to the land to the north and south of Cherry's Alley, and since this alley appears to have constituted the only means of ingress to and egress from the property prior to the separation of title, we find that an implied easement was created at the time Shields came into ownership of the property. Since the alley has continued to serve plaintiff's predecessors in title as the sole means of reaching the property, we conclude that plaintiff herself must be allowed to benefit from this use of the alley and hold that she had an easement implied from prior use.

Defendant also contends that the trial court erred in admitting into evidence a map prepared in 1976 of a tract of land south of Cherry's Alley which was introduced over defendant's objection. We find that this evidence was properly admitted.

The record indicates that defendant made a general objection to the offer of the exhibit in that the grounds for objection were not specified. A general objection, if overruled, will not be preserved on appeal unless there was no purpose for which the evidence could have been admitted. *State v. Ward*, 301 N.C. 469, 272 S.E. 2d 84 (1980). We find that the map was clearly admissible for the purpose of illustrating the testimony of the witness, Robert Smaw.

[2] Defendant also contends that the trial court erred in finding that plaintiff was damaged in the amount of \$4,876.80. It is alleged that this finding was based on incompetent evidence, since the only evidence regarding value was the testimony of plaintiff's son, who stated that, in his opinion, the value of his mother's

Knott v. Washington Housing Authority

property was \$16,256.00 prior to the time Cherry's Alley was closed and \$11,379.20 immediately after the alley was closed. We find that the trial judge did not abuse his discretion in denying defendant's motion to strike the testimony.

When an easement is taken by a third person the correct measure of damages is the difference in the fair market value of the land immediately after the taking. *See Hill v. Town of Hillsborough*, 48 N.C. App. 553, 269 S.E. 2d 303 (1980). It is established that the value of the use of property may be proved by the opinion evidence of witnesses acquainted with the property and the facts bearing upon its use. *Perkins v. Langdon*, 237 N.C. 159, 74 S.E. 2d 634 (1953). Moreover, it is not necessary that the witness be an expert. *Huff v. Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975). It is sufficient that the witness have such knowledge and experience and such familiarity with the property to be valued as will enable him to make an intelligent estimate of its value. *Highway Comm. v. Fry*, 6 N.C. App. 370, 170 S.E. 2d 91 (1969).

In the case at bar, plaintiff's son managed his mother's property and visited the land about four times per year. Moreover, he was familiar with the sales prices of the adjacent lots. We find that the court did not err in finding him competent to testify about the value of the property at issue.

[3] Lastly, plaintiff contends in her cross assignment of error that the court committed error in concluding as a matter of law that it could not properly sign and enter a judgment in this case allowing pre-judgment interest. The record reflects that the trial court originally provided in the judgment that plaintiff was entitled to recover interest on the damages from 25 September 1980, which was the date on which this action was initiated. Subsequently, defendant moved the court to amend the judgment to provide for interest only from the date of judgment. After considering the motion, the trial court concluded that it could not properly sign a judgment in this case allowing pre-judgment interest. We affirm the decision of the court.

It is established that pre-judgment interest may be awarded on the value of property from the date the property was taken. *Sanders v. Wilkerson*, 20 N.C. App. 331, 201 S.E. 2d 571 (1974). In the case at bar, it appears that since plaintiff couldn't actually

Simmons v. Tuttle

pinpoint the date on which her property was damaged for the purpose of measuring interest, she submitted the date on which this action was filed as the date from which interest would be tolled. It was the duty of plaintiff to show the actual date of taking. As she was unable to make such a showing, the trial court was correct in concluding as a matter of law that it could not sign and enter a judgment allowing pre-judgment interest.

The decision of the trial court is

Affirmed.

Judges WHICHARD and EAGLES concur.

SYLVESTER LEE SIMMONS v. JEROME CRAWFORD TUTTLE

No. 8321DC27

(Filed 21 August 1984)

1. Rules of Civil Procedure § 41— failure to prosecute—dismissal by court ex mero motu improper

G.S. 1A-1, Rule 41(b), which provides that a defendant may move for dismissal for failure of plaintiff to prosecute, does not authorize the court to dismiss an action *ex mero motu* for failure to prosecute.

2. Rules of Civil Procedure § 60.2; Judgments § 25.3— attorney's failure to appear—no imputation of negligence to plaintiff—plaintiff entitled to relief

The trial court erred in denying plaintiff's motion for relief from an order of dismissal pursuant to G.S. 1A-1, Rule 60(b)(1), where the record showed that plaintiff's original counsel withdrew and informed the court of new counsel's name; the clean-up calendar was not corrected to reflect the name of new counsel; plaintiff himself was without fault in not reporting to the court or attending the call of the clean-up calendar; and though the court could properly have found that plaintiff's new counsel was negligent for failing to ascertain that the case was on the clean-up calendar and acting accordingly, this neglect was not imputable to plaintiff.

Judges ARNOLD and JOHNSON concur in result.

APPEAL by plaintiff from *Alexander, Judge*. Judgment entered 11 October 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 1 December 1983.

Simmons v. Tuttle

By this civil action the plaintiff seeks to recover damages allegedly suffered as a result of defendant's negligence in causing an automobile accident. The complaint was filed on 13 March 1981; an answer and counterclaim was filed 7 April 1981; and a reply was filed on 23 April 1981. On 27 August 1981 plaintiff's first lawyer filed a motion requesting that he be allowed to withdraw. On 14 September 1981 the case was placed on the 8 December 1981 District Court Clean-Up Calendar, plaintiff's original counsel being listed thereon as attorney of record. The stated purpose of the calendar was to ascertain the status of the several hundred cases that were on it and to facilitate the making up of a new ready calendar and subsequent trial calendars. The cover page of the calendar was as follows:

DISTRICT COURT CLEAN-UP CALENDAR

TO: Members of the Bar and Litigants with cases pending in
Forsyth County District Court not represented by
counsel

FROM: Chief District Court Judge Abner Alexander

Attached hereto is a copy of the Clean-Up Calendar scheduled for call in the Forsyth County District Court, civil division, beginning Tuesday, December 8, 1981 at 9:30 a.m.

Cases will be called in order of appearance [sic] on the calendar. All cases in which no attorney or party appears at the call of the calendar and for which no written notice has been made prior to the call as outlined below, will be DISMISSED. A counterclaim is also subject to dismissal.

Written notice sufficient to excuse personal appearance at the calendar call and to avoid dismissal shall be made by each party, or attorney representing each party, to Judge Alexander prior to December 1, 1981.

The written notice shall indicate:

- (1) Name of attorney representing each party.
- (2) Whether cases are Jury or Non-Jury.
- (3) Whether case appears on any other District Civil Calendar.

Simmons v. Tuttle

- (4) Whether case is ready or not ready for trial, Reason for Non-readiness shall be stated.

If written notice incorporating the above mentioned information is NOT made to Judge Alexander on or before Tuesday, December 1, 1981, the cause of action or counterclaim of said non-notifying party will be dismissed if party or attorney is not present at the calling of the case at Clean-Up Calendar Call.

A SEPARATE WRITTEN NOTICE IS REQUIRED FOR EACH CASE. DO NOT SEND A LIST OF CASES ON ONE SHEET OF PAPER.

Any case not dismissed will be placed on a ready calendar. Cases in which a jury has been requested will be scheduled by the Court for trial at a jury session thereafter, without additional notice to counsel or parties. All others will be similarly scheduled for trial during non-jury weeks.

The files for the Clean-Up Calendar will be available for review in Room 427, Hall of Justice Building after Wednesday, November 25, 1981. All interested parties are urged to review files prior to that date.

This the 14th day of September, 1981.

On 28 September 1981 an order was entered allowing the motion of plaintiff's then counsel to withdraw from the case, but no notation thereof was made on the court's copy of the clean-up calendar. Having seen the calendar, plaintiff's former counsel wrote a letter on 22 October 1981 to Judge Alexander stating that he had been permitted by the court to withdraw and that Attorney Harrell Powell had replaced him, but again the clean-up calendar was not corrected accordingly. On 8 December 1981 when the clean-up calendar was called, neither the plaintiff nor his new attorney was present and the court entered an order dismissing the case for failing "to prosecute said action within a reasonable time." On 20 September 1982 plaintiff moved to set aside the judgment alleging under Rule 60(a) of the North Carolina Rules of Civil Procedure that it was entered because of the court's clerical mistake in listing his former attorney on the calendar as counsel and that the failure of his new attorney to attend the calling of the calendar was due to excusable neglect

Simmons v. Tuttle

under Rule 60(b); and on that day Judge Alexander entered an *ex parte* order in compliance therewith, setting aside the 8 December 1981 judgment. On 29 September 1982 defendant filed a motion to set aside the 20 September 1982 *ex parte* order, and following an 11 October 1982 hearing, an order was entered vacating the 20 September 1982 order and reinstating the judgment of dismissal. From this latter order plaintiff appeals.

Powell and Yeager, by Lawrence J. Fine and Harrell Powell, Jr., for plaintiff appellant.

Hutchins, Tyndall, Doughton & Moore, by Richard D. Ramsey, for defendant appellee.

PHILLIPS, Judge.

G.S. 7A-34 authorizes the North Carolina Supreme Court to establish rules of practice and procedure for the District and Superior Courts "supplementary to, and not inconsistent with, acts of the General Assembly." Among the rules adopted under this statutory authority is Rule 2 of the General Rules of Practice which, in pertinent part, provides:

Subject to the provisions of Rule 40(a), Rules of Civil Procedure and G.S. 7A-146:

(a) The Senior Resident Judge and Chief District Judge in each Judicial District shall be responsible for the calendaring of all civil cases and motions for trial or hearing in their respective jurisdictions. A case management plan for the calendaring of civil cases must be developed by the Senior Resident Judge and the Chief District Court Judge.

The case management plan developed by the Chief District Judge of the Twenty-First Judicial District apparently provides for periodically putting all cases that have been at issue for a few months on a clean-up calendar; dismissing those cases in which neither the plaintiff nor his counsel either appears at the call of the clean-up calendar or writes a letter ahead of time stating whether the cases are ready for trial, and if not, why; and putting the reported cases on a ready calendar, from which later trial calendars are drawn. And the record shows that plaintiff's case was routinely dismissed on the court's own motion, as the calen-

Simmons v. Tuttle

dar notice stated would happen, when neither plaintiff nor his new counsel either appeared at the call of the clean-up calendar or advised the court ahead of time in writing what the status of the case was. We do not believe that the court was empowered to dismiss plaintiff's case under the circumstances recorded.

[1] Rule 41(b) of the Rules of Civil Procedure in pertinent part provides: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, *a defendant may move for dismissal of an action* or of any claim therein against him." (Emphasis added.) We interpret this provision to mean that the court may not dismiss an action *ex mero motu* for failure to prosecute. A learned author in this field agrees: "In any event, the defendant must move for dismissal under the rule in order to obtain the benefits provided therein." Shuford, N.C. Civil Practice and Procedure (2d ed.) § 41-7, p. 327 (1981). Furthermore, there is no indication in the record that the case was stale or that plaintiff was unwilling to prosecute it. *Green v. Eure*, 18 N.C. App. 671, 197 S.E. 2d 599 (1973).

[2] Even if the court had possessed the authority to dismiss the action *ex mero motu*, its denial of plaintiff's motion for relief therefrom under Rule 60(b)(1) of the N.C. Rules of Civil Procedure was error. This rule authorizes relief from a judgment or order that is entered due to mistake, inadvertence, surprise or excusable neglect. It is quite plain that the plaintiff, as distinguished from his new counsel, was without fault in not reporting to the court or attending the call of the clean-up calendar, and his case should not have been dismissed because of it. Though the court could have properly found that plaintiff's new counsel was negligent for failing to ascertain that the case was on the clean-up calendar and acted accordingly, this neglect was not imputable to plaintiff; because an attorney's neglect will not be imputed to a litigant that is himself free of fault. *Moore v. Deal*, 239 N.C. 224, 79 S.E. 2d 507 (1954); *Kirby v. Asheville Contracting Co., Inc.*, 11 N.C. App. 128, 180 S.E. 2d 407, *cert. denied*, 278 N.C. 701, 181 S.E. 2d 602 (1971). According to the record, the dismissal was entered because plaintiff's attorney failed to discharge an administrative duty; a duty, as is generally known to the profession, that is rarely, if ever, discharged by litigants whose cases are being handled by lawyers, and that, for aught that the record shows, plaintiff knew nothing about. Thus, though the court certainly had

Mather v. Mather

grounds for sanctioning plaintiff's new counsel, had it chosen to do so, it had no grounds for sanctioning plaintiff at all, much less to the drastic extent of dismissing his case, and plaintiff's motion to set the judgment aside should have been granted.

The judgment of dismissal is vacated and this matter remanded to the District Court for trial or other proceedings in due course.

Vacated and remanded.

Judges ARNOLD and JOHNSON concur in result.

JUANITA P. MATHER, PLAINTIFF v. WENDELL C. MATHER, DEFENDANT

No. 834DC718

(Filed 21 August 1984)

1. Contempt of Court § 3— failure to comply with child custody order—criminal contempt

Pursuant to G.S. 50-13.3 the district court had a choice as to whether it would treat plaintiff's alleged disobedience of a child custody order as civil or criminal contempt. Where the court did not specify the nature of the proceeding but defendant alleged that plaintiff violated G.S. 5-1(4) (repealed and replaced by G.S. 5A-11(a)(3)) which alleges criminal contempt, and the court ordered the arrest of plaintiff which is available only in criminal contempt proceedings, the proceeding was one for criminal contempt.

2. Contempt of Court § 5.1; Divorce and Alimony § 25— disobedience of child custody order—order not vague—grounds for show cause motion

Where defendant sought an order requiring plaintiff to show cause why she should not be held in contempt for disobedience of a child custody order, there was no merit to plaintiff's contention that the show cause order should be dismissed because the motion for the order did not establish grounds for issuing it since defendant alleged that plaintiff and the children left the area where both parties lived without leaving a forwarding address or a phone number, and he alleged that plaintiff had willfully violated the decree which gave him visitation rights; nor was there merit to plaintiff's contention that the court order giving her custody was too vague to be enforceable by contempt because the order did not prevent plaintiff from taking the children out of the state, since the order awarding defendant visitation rights was sufficiently clear for plaintiff to know that she violated it by her surreptitious removal of the children and concealment of their location.

Mather v. Mather

3. Contempt of Court § 5— plaintiff's expected absence from show cause hearing—failure to make finding—arrest and bail improper

Where the trial court failed to make a finding that there was probable cause to believe that plaintiff would not appear at a show cause hearing, it was error to order the arrest of plaintiff to be held for \$10,000 bail to secure her appearance at the hearing. G.S. 5A-16(b).

4. Divorce and Alimony § 25.12— visitation rights—enforcement by reduction of child support

Visitation rights of defendant were connected to the welfare of his children to such an extent that the trial court could properly use the reduction of child support to enforce the visitation rights.

APPEAL by plaintiff from *Martin (James N.)*, Judge. Order entered 24 September 1982 in District Court, ONSLOW County. Heard in the Court of Appeals 12 April 1984.

The plaintiff has appealed from an order that she be arrested and held to bail in the sum of \$10,000.00 to secure her appearance in district court, and that the defendant be relieved of support payments for his children until a hearing may be held on a motion by the defendant. The plaintiff brought this action for divorce from the defendant, which divorce was granted on 3 February 1981. A separation agreement was incorporated into the divorce decree which provided that the plaintiff would have custody of the parties' five minor children and the defendant would pay her \$500.00 per month in child support. The defendant was given visitation rights with the children including two weekends per month and six weeks during summer vacation.

On 1 July 1982, the defendant filed a motion in which he alleged that the plaintiff had removed the children from North Carolina and he did not know their location. He asked, among other things, that an order be issued requiring the plaintiff to show cause why she should not be held in contempt and that he be relieved of child support payments until the plaintiff complied with the order of the court. After a hearing on the defendant's motion at which the plaintiff was not present but was represented by counsel, the court on 30 July 1982 ordered the plaintiff to appear on 20 September 1982 and show cause why she should not be held in contempt of court.

The plaintiff did not appear at the show cause hearing. Her attorney appeared and moved to dismiss the show cause order.

Mather v. Mather

He filed two affidavits by the plaintiff in which she said that she had taken the children to Kansas where they are now residing. She set forth specific incidences of conduct on the part of the defendant which she contended demonstrated that he made no effort to visit with the children while they lived in Onslow County.

The court denied the plaintiff's motion to dismiss and ordered the Sheriff of Onslow County to take the plaintiff into custody and hold her to bail in the sum of \$10,000.00 to secure her appearance in the District Court of Onslow County. The court also ordered that the defendant be relieved of any duty to make child support payments until a hearing could be held on the show cause order.

The plaintiff appealed.

Gene B. Gurganus for plaintiff appellant.

Ellis, Hooper, Warlick, Waters and Morgan, by Lana S. Warlick, for defendant appellee.

WEBB, Judge.

[1] This appeal involves in part a contempt citation. Chapter 5A of the General Statutes deals with contempt. Article 1 of that Chapter deals with criminal contempt and Article 2 deals with civil contempt. The procedures and punishment for the two types differ. The compelling of obedience to decrees for the benefit of private parties is ordinarily governed by the law dealing with civil contempt. *See Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966). Under this rule this proceeding would be one for civil contempt. The General Assembly, however, amended G.S. 50-13.3 effective 1 July 1978 to provide in part:

"(a) An order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes."

As we read this statute, the court had a choice as to whether it would treat the plaintiff's alleged disobedience as civil contempt or criminal contempt. The district court does not specify whether the proceeding is to determine whether the plaintiff

Mather v. Mather

should be held in civil contempt or criminal contempt. In his motion asking for the contempt citation, the defendant alleges the plaintiff had violated G.S. 5-1(4) which has been repealed and replaced by G.S. 5A-11(a)(3). This alleges a criminal contempt. The court ordered the arrest of the plaintiff which is available only in criminal contempt proceedings. We conclude that this proceeding is to determine whether the plaintiff is in criminal contempt and the procedure governing criminal contempt should be applied.

In her first assignment of error the plaintiff argues the court should have dismissed the show cause order. She argues first that the court did not make proper findings under G.S. 5A-23 to support the issuance of the order. G.S. 5A-23 applies in civil contempt proceedings. It has no application in this criminal contempt proceeding.

[2] The plaintiff also argues that the order to show cause should be dismissed because the verified motion for the order does not establish grounds for issuing the order. The defendant stated in the motion that the plaintiff had left the Jacksonville area without leaving a forwarding address and that he did not have an address or telephone number for his minor children. He alleged that the plaintiff had willfully violated the decree which gave him visitation rights with his children. The motion says in effect that the plaintiff has secreted herself and the minor children so that the defendant cannot find her or the children. We hold this is the allegation of sufficient facts to show the plaintiff was willfully disobeying the order of the court which allowed the defendant visitation rights with his minor children.

The plaintiff also argues that the order to show cause should have been dismissed because the court order which granted her custody is too vague to be enforceable by contempt. The order does not prohibit the plaintiff from taking the children from the state and apparently the plaintiff contends she cannot be cited for contempt because this is all she has done. It is not the removal of the children from the state which may violate the order. It is the surreptitious removal and the concealment of their location depriving the defendant of his visitation rights which may violate the court's order. We believe the order which provides for reasonable visitation rights for the defendant is sufficiently clear so that

Mather v. Mather

the plaintiff should know she would violate the order by doing as she has been alleged to have done.

[3] The plaintiff next contends it was error for the court to order the arrest of the plaintiff to be held for \$10,000.00 bail to secure her appearance at the show cause hearing. G.S. 5A-16 provides in part:

“(b) If a judicial official who initiates plenary proceedings for contempt under G.S. 5A-15 finds, based on sworn statement or affidavit, probable cause to believe the person ordered to appear will not appear in response to the order, he may issue an order for arrest of the person, pursuant to G.S. 15A-305. A person arrested under this subsection is entitled to release under the provisions of Article 26, Bail, of Chapter 15A of the General Statutes.”

G.S. 5A-16 deals with proceedings for criminal contempt. Because the plaintiff was cited for criminal contempt, the court had the power to have her arrested and held until she posted bail to assure her appearance. The court should have made a finding, which it did not, that there was probable cause to believe the plaintiff would not appear in response to the order to show cause. For the failure to make this finding, we reverse the part of the order for the plaintiff's arrest.

[4] The plaintiff next contends it was error to relieve the defendant of child support payments until a hearing is held on the order to show cause. Child support may be vacated upon a showing of changed circumstances. G.S. 50-13.7. The removal of the children from North Carolina and the effective proscription of the defendant's right to see the children is a change in circumstance. The plaintiff contends it is not such a change as to allow the court to relieve the defendant of child support payments. She argues that the only change which would support a modification of support would be a change in the needs of the children or the ability of the defendant to provide support. We have found no case in this jurisdiction which is precedent for this case, but we believe that the visitation rights of the defendant are connected to the welfare of the children to such an extent that the court could use the reduction of child support to enforce the visitation rights. As we read the court's order, if the plaintiff appears for the show cause hearing, the child support payments will be restored. We

Acosta v. Clark

hold that it was not error for the court to reduce child support payments as it did. For cases from other jurisdictions which hold as we do, see *White v. White*, 71 Cal. App. 2d 390, 163 P. 2d 89 (1945); *Adams v. Adams*, 196 A. 2d 915 (App. D.C. 1964); and *Craig v. Craig*, 157 Fla. 710, 26 So. 2d 881 (1946).

Affirmed in part; reversed in part.

Judges HILL and WHICHARD concur.

FELIX ESTEPHEN ACOSTA v. ELIZABETH JANE CLARK (ACOSTA)

No. 834DC430

(Filed 21 August 1984)

Divorce and Alimony § 19.5— separation agreement incorporated in divorce judgment—modification of alimony provisions

The parties' separation agreement which was incorporated into the court's divorce judgment could be modified with respect to its alimony provisions, notwithstanding language in the agreement that it could not be modified without the consent of the parties.

APPEAL by plaintiff from *Martin (James N.)*, Judge. Judgment entered 6 January 1983 in District Court, ONSLOW County. Heard in the Court of Appeals 8 March 1984.

This appeal arises as a result of the trial court granting defendant's motion to dismiss plaintiff's motion in the cause requesting a modification of an alimony provision contained in a separation agreement which was duly incorporated into a judgment for absolute divorce. In dismissing plaintiff's motion for modification, the trial court held that as a matter of law it had no authority to modify the alimony provisions of the agreement. Plaintiff appeals.

For reasons to follow, we hold that the trial court erred in holding that the alimony provisions were not modifiable except by the consent of the parties.

Acosta v. Clark

The sole issue presented on appeal is whether the trial court erred in holding as a matter of law that it did not have authority to modify the alimony provisions of the agreement.

Gaylor, Edwards and McGlaughon, by Jimmy F. Gaylor, for plaintiff appellant.

Ellis, Hooper, Warlick, Waters and Morgan, by Lana S. Warlick, for defendant appellee.

JOHNSON, Judge.

The undisputed facts are as follows: On 15 May 1980, the parties entered into a valid and enforceable separation agreement and property settlement which contained, *inter alia*, the following provisions relating to the payment of alimony by the plaintiff-husband to the defendant-wife:

(6) . . . The husband [plaintiff] hereby acknowledges that the Wife [defendant] is entitled to alimony . . . until remarriage.

Husband agrees to pay to the Wife the sum of \$300.00 per month for her support and maintenance until remarriage.

The provisions for payment of alimony to the Wife shall not be modified or changed except by further agreement between the parties expressed in writing.

The provisions for alimony to the Wife are independent of any division or agreement for division of property between the parties, and shall not for any purpose be deemed to be a part of or merged in or integrated with a property settlement of the parties.

(9) . . . Should a divorce be decreed in any action or proceeding between the parties, this agreement shall be submitted to the court for its approval and the provisions hereof shall, if the court approves, be incorporated in, merged with, and become a part of such decree, and shall be enforceable as a part thereof.

On 16 March 1981, plaintiff filed an action for divorce based on a one year separation and sought to have the separation agreement incorporated into the divorce judgment. Defendant answered on 30 March 1981, requesting that plaintiff be granted the

Acosta v. Clark

relief prayed for in his complaint. On 1 April 1981, a judgment was entered granting plaintiff's divorce, and incorporating into it the separation agreement. On 10 November 1982, plaintiff made a motion in the cause for modification of the alimony portions of the divorce judgment alleging a change in circumstances of the parties since entry of that judgment. Defendant moved to dismiss plaintiff's motion alleging that as a matter of law the court lacked jurisdiction and the authority to modify the alimony provisions of the separation agreement. The basis for defendant's motion was that the alimony provisions of the agreement were not modifiable, even though they had been incorporated into the divorce judgment, because the agreement was a contract containing clear and unambiguous language that the alimony provisions were not to be modified except by the consent of both parties in writing.

The trial court made findings of fact consistent with the above undisputed facts, and further found (1) that by incorporating the separation agreement into the divorce judgment of 1 April 1981, the court thereby intended to order plaintiff to pay to defendant alimony; (2) that plaintiff and defendant have not agreed to modify or change the separation agreement; is clear and unambiguous, leaving no room for construction.

Based upon its findings of fact, the court concluded as a matter of law that plaintiff is obligated to pay to defendant for her support and maintenance the sum of \$300.00 per month until her remarriage and that the alimony provisions cannot be modified or changed except by written agreement entered into by the parties.

I

Defendant first argues that the question of whether alimony payments can be modified has not been completely resolved; and that courts have only used terms such as "usually" and "ordinarily" in describing the lower court's authority to modify a consent order. In other words, defendant appears to argue that this is not the "usual" or "ordinary" case and therefore modification is inappropriate. While we agree that the courts have occasionally used such language, they have nonetheless based their decision upon a principled distinction between two types of consent judgment.

In one, the court merely approves . . . the payments which the husband has agreed to make for the wife's support and

Acosta v. Clark

sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. . . . In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specific amounts as alimony.

Bunn v. Bunn, 262 N.C. 67, 69, 136 S.E. 2d 240, 242 (1964); *See also Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967). The contract-judgment of the first type is not enforceable by the court's contempt powers. It cannot be changed except with the consent of both parties. *Bunn, supra*, at 69, 136 S.E. 2d at 242. However, "[a] judgment of the second type, being an order of the court, may be modified by the court at any time changed conditions make a modification right and proper." *Id.* at 69, 136 S.E. 2d at 243.

To be considered a judgment of the second type, which is modifiable by the court, the support provisions of the agreement and the parties' property settlement must not "constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision." *Id.* at 70, 136 S.E. 2d at 243. In such a situation the provisions would not be separable and could not be modified without the consent of both parties. *Id.*; *White v. White*, 37 N.C. App. 471, 475, 246 S.E. 2d 591, 594 (1978).

Defendant does not dispute that the support provisions are independent of the property settlement. In fact, the separation agreement expressly states that they are independent. Further, defendant does not dispute that the separation agreement was duly incorporated into the divorce judgment. When incorporation of the parties' agreement into the court order takes place, the terms of the agreement are superseded by the court's decree. *Mitchell, supra*, at 256, 154 S.E. 2d at 73.

Defendant argues that the judgment is not modifiable because the parties expressly agreed that it was not modifiable except with the consent of both parties. This argument is without merit. The Supreme Court has clearly stated that "[a] court-ordered consent judgment is enforceable by civil contempt notwithstanding the fact that it contains unequivocal language that it

Acosta v. Clark

is non-modifiable." *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E. 2d 345, 350 (1983).

II

Defendant further contends that it would not be inconsistent with public policy to uphold the parties' original agreement respecting the alimony payments. However, the legislative intent, as expressed in G.S. 50-16.9, is that the public policy of North Carolina shall be in favor of modification of alimony provisions contained in consent judgments and the analogous area of incorporated separation agreements.

In addition, the Supreme Court, having noted some confusion in this area of family law, recently held:

[W]henver the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable and enforceable by the contempt powers of the court. . . .

Walters v. Walters, 307 N.C. 381, 386, 298 S.E. 2d 338, 342, *reh'g denied*, 307 N.C. 703 (1983). As justification for this seemingly harsh rule, the Court noted that if the parties wish to preserve their agreement as a contract they need only avoid submitting their agreement to the court. *Id.* While the *Walters* Court expressly stated that its holding was not to apply retroactively to judgments entered, as here, before its date of decision, *Walters* nevertheless reaffirms the long-standing policy in North Carolina in favor of the modification of alimony payments.

Basing our decision upon the cases decided prior to *Walters* and upon the policy in this state as set forth in *Walters* and its progeny as well as G.S. 50-16.9, we hold that the alimony provisions of the separation agreement, under discussion, which were separable and independent, and which were incorporated into the divorce judgment were modifiable notwithstanding any express language to the contrary. Therefore, the district court had the

In re Petition of Jonas

authority to order appropriate modification upon a showing of change of circumstances as required by statute.

For the reasons stated, the order of the district court dismissing plaintiff's motion in the cause for modification of the alimony award is reversed and this cause is remanded for a hearing on plaintiff's motion in the cause.

Reversed and remanded.

Judges HEDRICK and HILL concur.

IN THE MATTER OF THE PETITION OF JOHN K. JONAS, JR., FOR AN ADMINISTRATIVE REVIEW OF A DECISION OF THE SECRETARY OF REVENUE WITH RESPECT TO ASSESSMENT OF SALES TAX AGAINST HIM, INDIVIDUALLY, AS PRESIDENT OF BLUE RIDGE SPORTCYCLE COMPANY, INC.

No. 8310SC527

(Filed 21 August 1984)

1. Corporations § 8; Taxation § 31— sales and use tax—personal liability of corporate officer

Respondent corporate officer could be held personally liable for unpaid sales and use taxes under either paragraph of G.S. 105-253, and there was therefore no merit to respondent's contention that, in order to be liable for the taxes, he had to have possession of corporate funds at the time when the corporation owed state taxes and allowed the funds to be paid out or distributed to the stockholders.

2. Corporations § 8; Taxation § 31— sales and use tax—uncollected checks—unreasonable delay in notice by Department of Revenue—due diligence not required

Though the evidence indisputably showed that failure by the Department of Revenue either to assess or to notify respondent's corporation over a period of several months that it could not collect on checks written by respondent was unreasonable, and there was evidence that this delay was a factor in the taxes not being collected from the corporation, the Department could nevertheless collect from respondent, a corporate officer, since the Department's power to collect corporate sales and use taxes from responsible officers does not depend upon its own due diligence.

APPEAL by respondent from *Britt, Samuel E., Judge*. Judgment entered 1 March 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 2 April 1984.

In re Petition of Jonas

At the times involved herein, John K. Jonas, Jr. was President of Blue Ridge Sportcycle Company, Inc. (Blue Ridge). This company was in Asheville and its business was selling and servicing motor vehicles. For the months of May and June, 1975, the company filed timely sales and use tax reports with the N. C. Department of Revenue and attached to each report a check drawn on Intercontinental Banking Corporation, Ltd. of London, England (Intercontinental) for the full amount due. The checks were deposited in the bank (Wachovia) as received; but Wachovia returned them, stating that the checks could not be handled as cash items, and informed the Department that Intercontinental was being investigated by the federal government. The Department then returned the checks to Wachovia for collection as non-cash items, but it neither assessed Blue Ridge for the unpaid taxes nor advised it that a problem involving Intercontinental existed. Intercontinental ceased to do business during the latter part of 1975, and on January 20, 1976, Wachovia notified the Department that it had been unable to collect on the checks. The Department assessed Blue Ridge for the unpaid tax liability the next day, by which time Blue Ridge was also a failed business due to Intercontinental's defalcations. The assessment not having been paid by Blue Ridge, on 13 August 1976 the Department assessed the respondent individually, pursuant to G.S. 105-253, for the taxes, penalties, and interest due from Blue Ridge.

In a hearing before the Secretary of Revenue, respondent's evidence tended to show that the checks eventually sent on to Intercontinental were dishonored because of large embezzlements by an Intercontinental officer, and contended that the checks could have been collected if they had been processed in a timely fashion, or collection could have been made from the company if the Department had assessed it. The Secretary assessed respondent for the taxes and interest owed by Blue Ridge, but did not impose the 10% penalty.

Respondent sought review before the Tax Review Board, which body remanded the cause to the Secretary for additional findings. Upon remand, the Secretary made additional findings but reached the same conclusion. Respondent again requested review by the Board, which reversed, the key conclusion being that the Department's delay in notifying Blue Ridge the checks had not been paid "was unreasonable and contributed to the fail-

In re Petition of Jonas

ure of the Secretary of Revenue to collect the taxes due." The Secretary petitioned for review in the Superior Court, where the Tax Review Board's ruling was reversed and the Secretary's decision reinstated.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the Secretary of Revenue.

McLean & Dickson, by Russell L. McLean, III, for respondent appellant.

PHILLIPS, Judge.

The North Carolina Administrative Procedure Act, G.S. 150A-1, *et seq.*, governed the review of this case by the Superior Court. In reversing the decision of the Tax Review Board, Judge Britt concluded that the decision was "affected with error of law and not supported by substantial evidence in view of the entire record"; each of which is a good ground under G.S. 150A-51 for reversing an agency decision.

[1] In working from that starting point, we must first determine whether the Secretary was authorized by G.S. 105-253 to assess respondent personally with the taxes owed by the corporation. This statute at that time, in pertinent part, provided:

§ 105-253. *Personal liability of officers, trustees, or receivers.*—Any officer, trustee, or receiver of any corporation required to file report with the Secretary of Revenue, having in his custody funds of the corporation, who allows said funds to be paid out or distributed to the stockholders of said corporation without having satisfied the Secretary of Revenue for any State taxes which are due and have accrued, shall be personally responsible for the payment of said tax, and in addition thereto shall be subject to a penalty of not more than the amount of the tax, nor less than twenty-five percent (25%) of such tax found to be due or accrued.

Each responsible corporate officer is made personally and individually liable:

- (1) For all sales and use taxes collected by a corporation upon taxable transactions of the corporation, which liability shall be satisfied upon

In re Petition of Jonas

timely remittance of such taxes to the Secretary by the corporation; and

- (2) For all sales and use taxes due upon taxable transactions of the corporation but upon which the corporation failed to collect the tax, but only if the responsible officer knew, or in the exercise of reasonable care should have known, that the tax was not being collected.

His liability shall be satisfied upon timely remittance of such tax to the Secretary by the corporation. If said tax shall remain unpaid by the corporation, after the same is due and payable, the Secretary of Revenue may assess the tax against, and collect the tax from, any responsible corporate officer in accordance with the provisions of G.S. 105-241.1, which officer shall be the "taxpayer" in such case, as referred to in G.S. 105-241.1 et seq. As used in this section, the words "responsible corporate officers" mean the president and the treasurer of a corporation and may include such other officers as have been assigned the duty of filing tax returns and remitting sales and use tax to the Secretary of Revenue on behalf of the corporation.

Respondent contends that this statute is a unified whole and that a corporate officer cannot be held liable for unpaid sales and use taxes thereunder unless he had possession of corporate funds at the time when the corporation owed state taxes and allowed the funds to be "paid out or distributed to the stockholders," as stated in the first paragraph. This contention is without merit. Quite plainly, the first two paragraphs of G.S. 105-253 are independent of each other; each provides a means for holding officers personally liable for unpaid corporate taxes. The two paragraphs were enacted at different times; the first in 1939, the second in 1973. They differ in scope; the first applies to all state tax schedules, while the second is limited to sales and use taxes. Neither paragraph requires reference to the other for definition of terms or for any other reason. Thus, that the first paragraph of G.S. 105-253 did not authorize the Secretary to assess the respondent under the circumstances recorded does not prevent him from being assessed under the provisions of the second paragraph. Which, on the facts recorded, was clearly authorized, we

In re Watson

think. The respondent was a "responsible corporate officer" of Blue Ridge and the sales and use taxes collected by that corporation were not satisfied by remittance to the Secretary. Under the second paragraph of the statute, that was enough to support the assessment.

[2] We now consider Judge Britt's conclusion that the decision of the Tax Review Board was "affected with error of law and not supported by substantial evidence in view of the whole record." We differ with the Judge as to the Board's decision not being supported by substantial evidence. The evidence indisputably shows, we think, that the Department's failure to either assess or notify Blue Ridge of the uncollected checks during the several months that passed was unreasonable and the record contains substantial evidence that this delay was a factor in the taxes not being collected from the corporation. Nevertheless, under the statute, the Department's power to collect corporate sales and use taxes from responsible officers does not depend upon its own due diligence, and Judge Britt's ruling that the Board's decision was "affected with error of law" was correct.

Affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

IN RE: BLEDSOE WATSON, ADMINISTRATOR OF THE ESTATE OF RAY
JUNIOR WATSON, DECEASED

No. 8319SC469

(Filed 21 August 1984)

Appeal and Error § 6.2; Executors and Administrators § 36.1— voluntarily dismissed suit—claim against estate—order discharging administrator revoked—appeal premature

The clerk of superior court correctly treated a voluntarily dismissed suit as a "claim" against an estate and acted within his authority in setting aside an order discharging petitioner as administrator, and the trial court's order affirming the clerk's action was not appealable since the ruling was interlocutory; the trial court did not certify that there was no just reason for delay; and no substantial right was affected by requiring petitioner to continue as administrator.

In re Watson

APPEAL by petitioner from *Seay, Judge*. Order entered 16 December 1982 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 13 March 1984.

Archie Shirley and the decedent, Ray Junior Watson, were riding together in July 1977 in Shirley's car when it left the road, killing Watson and injuring Shirley. Petitioner Bledsoe Watson, Ray Junior's father, applied for and received letters of administration in February 1978. Within the six month limitation period petitioner filed a wrongful death action against Shirley and Shirley counterclaimed (each alleged the other party was driving). The wrongful death action was later settled out of court.

In October 1979, petitioner filed a "final" account which the Clerk of Superior Court duly approved, although it contained no mention of the pending counterclaim. On 14 May 1980, the clerk, having learned of the omission, issued an order *nunc pro tunc*, changing the "final" account to an "annual" account and ordering petitioner to continue administration. Shirley took a voluntary dismissal without prejudice pursuant to G.S. 1A-1, Rule 41(a) that same day. Petitioner then refiled the same statement, again as a final account, on 29 July 1980, and an order approving it as final and discharging him was entered by the clerk 12 August 1980. On 8 May 1981, Shirley filed his new complaint. Petitioner moved to dismiss on the ground that he was not acting as administrator at the time of filing.

On 14 August 1981, the clerk set aside the discharge of 12 August 1980 and again changed the final account to an annual account, *nunc pro tunc*. The clerk found that petitioner had failed to inform the court of the order allowing Shirley to refile his claim, and ordered petitioner to continue as administrator. On appeal to the Superior Court, and after hearing and argument, the court adopted and affirmed the clerk's order. From this order petitioner appeals.

Tuggle, Duggins, Meschan, Thornton & Elrod, by Richard L. Vanore, for petitioner appellant.

Ottway Burton, P.A., by Ottway Burton, for appellee Archie L. Shirley.

In re Watson

JOHNSON, Judge.

Neither party presents the issue to this Court, but as a threshold jurisdictional question we must determine whether Judge Seay's order is presently appealable. *State v. School*, 299 N.C. 351, 261 S.E. 2d 908, *aff'd on rehearing*, 299 N.C. 731, 265 S.E. 2d 387 (per curiam), *appeal dismissed* 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed. 11 (1980). For the reasons set out below we conclude that it is not.

The order entered by the clerk was within his authority. The clerk is authorized to "[o]pen, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court." G.S. 7A-103(9). This broad grant necessarily includes the power to correct, *nunc pro tunc*, orders entered on erroneous misapprehension of the facts, as here. The Superior Court essentially adopted and affirmed the clerk's order.

Petitioner argues that since Shirley had taken a voluntary dismissal of his suit there were no "claims" against the estate. By extension, then, he was entitled to his discharge in August 1980 under G.S. 28A-23-1, and therefore the clerk could not order the administration continued. The applicable General Statutes do not define "claim." They do distinguish between "claims" and "claims duly presented." G.S. 28A-19-1.¹ A personal injury claim against the estate is "duly presented" upon filing, indicating a legislative recognition of its existence *as an unrepresented claim* before filing. G.S. 28A-19-1(2). The statutes further provide for the payment of "unliquidated" or "contingent" claims. G.S. 28A-19-5. This may be by such method as the clerk may order, G.S. 28A-19-5(4), including, it would seem, holding the estate open until the lawsuit was finally abandoned or resolved. The dictionaries also do not define "claim" as requiring a specific demand filed or reduced to writing. *See* Black's Law Dictionary 224 (5th ed. 1979); 14 C.J.S. Claim (1939). A claim may be a cause of action, *id.* at 1184, which has generally been defined not as some legal filing, but as the existence of a set of facts justifying judicial relief. *Exum v. Boyles*,

1. G.S. 28A-19-1 was rewritten by 1977 N. C. Sess. Laws c. 446, s. 1. That Act, effective 1 September 1977, applied only to the administration of estates of persons who died on or after its effective date. 1977 N. C. Sess. Laws c. 446, s. 5. Ray Junior Watson died in July 1977; accordingly the new section does not apply and we express no opinion as to its effect.

In re Watson

272 N.C. 567, 158 S.E. 2d 845 (1968); see Black's Law Dictionary 201 (5th ed. 1979); 1 C.J.S. actions § 8 (1936). Accordingly, we hold that the clerk correctly treated Shirley's voluntarily dismissed suit as a "claim" and acted within his authority in correcting his erroneous discharge of petitioner.

The ruling from which petitioner attempts to appeal clearly did not constitute a final judgment, or other final termination of the action. It therefore was interlocutory: "a ruling is interlocutory in nature if it does not determine the issues but directs some further proceeding preliminary to a decree." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 333, 299 S.E. 2d 777, 779 (1983). The present order, by lawfully correcting an earlier erroneous order, merely contemplated continued administration of an established estate and its final settlement after resolution of the one outstanding claim.

Accordingly, since the trial court did not certify that there was no just reason for delay, G.S. 1A-1, Rule 54(b), no appeal would lie unless the order affected a substantial right. G.S. 1-277; G.S. 7A-27; *Blackwelder, supra*. The "substantial right" exception does not apply unless the appellant would lose some substantial right if the ruling or order is not reviewed before final judgment in the trial division. *Id.*

No substantial right appears to be affected by continuing petitioner as administrator. This is particularly true in light of the fact that petitioner himself originally applied to serve as administrator; nothing in the record suggests that any other person would be preferable. It is true that the appointment serves to expose the estate to liability for the decedent's alleged tort, but that is inherent in the very nature of the estate itself and no especial prejudice results.

The real effect of the order is to allow Shirley to continue his action against the estate. The resulting pretrial procedure and ensuing trial do not affect a substantial right, however. Avoidance of a trial is not a substantial right entitling a party to immediate appeal. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Blackwelder, supra*. Although this rule ordinarily applies to attempted appeals in the same case in which the trial is to be held, its logic is equally applicable to obviously interdependent matters such as those at issue here.

Smith v. DHL Corp.

The trial division should therefore resolve the liability issue before appeal in this case. Petitioner has no right of appeal presently, and his appeal is accordingly

Dismissed.

Judges HEDRICK and HILL concur.

JUDITH B. SMITH, EMPLOYEE v. DHL CORPORATION, EMPLOYER, AND INSURANCE COMPANY OF NORTH AMERICA, CARRIER

No. 8310IC929

(Filed 21 August 1984)

Master and Servant §§ 55.3, 55.4— workers' compensation—injury to ears during airline flight—accident—injury arising out of and in course of employment

Evidence was sufficient to support the Industrial Commission's finding that plaintiff sustained an injury by accident arising out of and in the course of her employment where it tended to show that an airline flight exposed plaintiff to a condition (fluctuating cabin pressure) capable of producing the unexpected consequences of a fistula; this was an unlooked for and untoward event which was neither expected nor designed by plaintiff; plaintiff's medical witness testified that the change in cabin pressure in the airplane could cause a fistula and that plaintiff's injury would have had to occur during the flight; this was the first time plaintiff had flown on a commercial airliner for her employer; and the flight was an interruption of her normal work routine.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and award by Full Commission filed 25 April 1983. Heard in the Court of Appeals 5 June 1984.

This is a workers' compensation claim wherein plaintiff-employee seeks workers' compensation benefits for an injury allegedly suffered in an accident arising out of and in the course of her employment.

Plaintiff, a courier for defendant-employer, developed ear trouble after returning from a work-related flight on a commercial airliner in December of 1979. Plaintiff, who had worked for defendant employer for six months, routinely drove a car or van when she made courier deliveries. This was the first time she had flown for her employer. At a hearing before Deputy Commission-

Smith v. DHL Corp.

er Sellers, plaintiff's evidence showed, *inter alia*: that, during a flight to Atlanta to deliver materials for her employer, her ears began to "fill up" and she became dizzy; that in the following weeks, she continued to experience dizziness and nausea; that in May of 1980, an otolaryngologist performed surgery to repair a perforation of the "window" between the middle ear and the inner ear (a "fistula") which would allow leakage of inner ear fluid into the middle ear, causing dizziness; that, although plaintiff experienced immediate improvement in the dizziness after the surgery, she has had recurring problems with dizziness; that plaintiff had a previous hearing loss; that plaintiff had previously had middle ear infections which would make plaintiff more apt to suffer a fistula and resulting leakage and dizziness; and that a normal change in cabin pressure in an airplane would be capable of producing a fistula. Defendant's evidence showed: that the otolaryngologist did not actually see a hole in plaintiff's eardrum, but surgically covered areas of the inner ear with fatty tissue so as to repair any leak that was not visually observable; and that the otolaryngologist was unable to say if plaintiff's previous hearing loss had been worsened by the alleged accident.

In August of 1982, Deputy Commissioner Sellers denied plaintiff's claim, concluding that plaintiff did not sustain an injury by accident within the meaning of the Workers' Compensation Act. On 25 April 1983, the Full Commission filed an opinion and award amending the opinion and award entered by Deputy Commissioner Sellers by striking certain findings of fact and conclusions of law and inserting in lieu thereof findings and conclusions to the effect that plaintiff did sustain an injury by accident arising out of and in the course of her employment. The Full Commission ordered defendants to pay all medical expenses incurred by plaintiff as a result of the injury, awarded an attorney's fee to plaintiff equal to 25% of the amount of compensation due to plaintiff, ordered that if the parties were unable to agree on the amount of compensation due for temporary total and permanent partial disability, then the case should be rescheduled for hearing on the amount of compensation, and ordered defendants to pay costs. From the opinion and order by the Full Commission, defendants appeal.

Smith v. DHL Corp.

Wilson & Kastner, by James L. Wilson, for plaintiff-appellee.

Smith, Moore, Smith, Schell & Hunter, by Richmond G. Bernhardt, Jr. and Caroline Hudson, for defendant-appellants.

EAGLES, Judge.

Defendants assign as error the Industrial Commission's finding and conclusion that plaintiff sustained an injury by accident arising out of and in the course of her employment. Defendants contend that the finding and conclusion are not supported by competent evidence in the record and are therefore erroneous and contrary to law. We do not agree.

Findings of fact made by the Commission are conclusive on appeal when supported by competent evidence, even when there is evidence to support a contrary finding of fact. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982). We must therefore determine whether there is competent evidence to support the Full Commission's Finding of Fact Number 3. It reads: "On December 21, 1979 plaintiff sustained an injury by accident arising out of and in the course of her employment."

We note that the Full Commission's Finding of Fact Number 3 is, by its terms, a conclusion of law. However, our Supreme Court has held that "[w]hether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings." *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E. 2d 807, 809 (1982), citing *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E. 2d 676, 678 (1980). Here, the evidence is sufficient to support the Full Commission's finding of fact.

In our review, we first consider whether the injury suffered by plaintiff was the result of an accident. The term accident, as used in the Workers' Compensation Act, has been defined as, (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause. *O'Mary v. Land Cleaning Corp.*, 261 N.C. 508, 510, 135 S.E. 2d 193, 194 (1964).

Here, there was medical testimony that an airline flight exposed plaintiff to a condition (fluctuating cabin pressure) capable

Wilfong v. Wilkins, Com'r of Motor Vehicles

of producing the unexpected consequences of a fistula. Clearly this was an unlooked for and untoward event which was neither expected nor designed by the plaintiff. Further, Dr. Robert Lawrence testified that such change in cabin pressure in the airplane could cause a fistula and that since plaintiff's "symptoms were not there before the flight and occurred during and were present after then, it would have to occur at that time . . . I would have to date it to that very time." This evidence supports the Full Commission's finding of an accidental injury.

We next consider whether this accidental injury arose out of and in the course of plaintiff's employment. Defendants concede that it did. Plaintiff's evidence consisted of testimony that 21 December 1979 was the first time she had flown on a commercial airliner for her employer and that this flight was an interruption of her normal work routine. This, combined with the medical testimony, is sufficient to support a finding that the accident "arose out of" plaintiff's employment. See *Lefler v. Lexington City Schools*, 60 N.C. App. 194, 298 S.E. 2d 404 (1982).

We hold that there was sufficient evidence to support the Commission's finding and conclusion that plaintiff sustained an injury by accident arising out of and in the course of her employment.

Affirmed.

Judges ARNOLD and WHICHARD concur.

TAMMY FAYE WILFONG (CARPENTER) AND HARLEYSVILLE MUTUAL INSURANCE COMPANY v. R. W. WILKINS, JR., COMMISSIONER OF MOTOR VEHICLES

No. 8310SC949

(Filed 21 August 1984)

Automobiles § 2— driver's license of judgment debtor—suspension required

Where plaintiff's estranged husband either negligently or intentionally caused one of plaintiff's vehicles to collide with her other vehicle, plaintiff obtained a judgment against her husband for damages to her automobiles, and the judgment remained unsatisfied for longer than 60 days, defendant was re-

Wilfong v. Wilkins, Com'r of Motor Vehicles

quired pursuant to G.S. 20-279.13 to suspend the husband's driver's license as plaintiff requested.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 26 May 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 5 June 1984.

This is a civil action to compel the defendant to suspend the driver's license of a judgment debtor pursuant to the provisions of G.S. 20-279.13. The pertinent facts stipulated to by the parties are as follows: On 4 February 1980, plaintiff Tammy Faye Wilfong (Carpenter) owned two motor vehicles, a 1971 Pinto and a 1979 Camaro. She had in effect an automobile liability insurance policy issued by plaintiff Harleysville Mutual Insurance Company, which covered both vehicles and met the requirements of our financial responsibility laws. On that day, James Rudolph Carpenter, plaintiff Wilfong's estranged husband, was operating and in lawful possession of the Pinto on a public street or highway when he either negligently or intentionally caused the Pinto to collide with the Camaro and damaged both vehicles. At that time, Carpenter neither owned an automobile nor had an automobile liability insurance policy in effect. Wilfong sued Carpenter and obtained judgment against him for the damages that her automobiles sustained. After the judgment remained unsatisfied for a period in excess of sixty days, it was certified to the Department of Motor Vehicles by the Clerk of Superior Court, with plaintiff's request, as a judgment creditor, that Carpenter's driving privileges be suspended pursuant to the provisions of G.S. 20-279.13. Defendant Commissioner declined to suspend such privileges, however, and plaintiff sued for a writ of mandamus to require him to do so. After a hearing before Judge Brannon, an order was entered directing defendant to suspend Carpenter's license to operate a motor vehicle in the state.

Attorney General Edmisten, by Assistant Attorney General William B. Ray, for defendant appellant.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by William Eugene Anderson, for plaintiff appellees.

Wilfong v. Wilkins, Com'r of Motor Vehicles

PHILLIPS, Judge.

Each of the statutes hereinafter referred to is a part of the Motor Vehicle Safety and Financial Responsibility Act of 1953. G.S. 20-279.1(3) defines a judgment under the Act as a final judgment for damages "arising out of the ownership, maintenance or use of any motor vehicle." Under G.S. 20-279.15(3), a judgment for property damages in excess of \$10,000 is deemed satisfied for the purposes of the Act when \$10,000 has been credited against it. And G.S. 20-279.13, with certain exceptions, provides that upon receiving a certified copy of a judgment that has remained unsatisfied for a period of sixty days that the Commissioner of Motor Vehicles "shall forthwith suspend the license . . . of any person against whom such judgment was rendered." The statutory exceptions, none of which apply to this case, are: (1) When the insurance carried by the owner or driver is in a company approved to do business here that goes into liquidation after the accident and before judgment, G.S. 20-279.13(b); (2) where the judgment creditor consents in writing for the judgment debtor to retain his license, G.S. 20-279.13(c); and (3) where an order is entered permitting the judgment to be paid in installments, G.S. 20-279.16. Since Carpenter's situation as a judgment debtor in a motor vehicle accident case clearly falls within the purview of G.S. 20-279.13, and has not been excepted therefrom by any other statute, the Commissioner was required, we believe, to suspend Carpenter's driver's license as plaintiff requested. Thus, the order compelling him to do so is affirmed.

Though defendant concedes in his brief that "a literal interpretation or construction" of the statutes above referred to would seem to require the suspension of Carpenter's license to operate a motor vehicle, he contends that we should find that that was not what the General Assembly intended. In so arguing, defendant points to the fact that, under the facts recorded, Carpenter was in compliance with other provisions of the Motor Vehicle Safety and Financial Responsibility Act of 1953, which also authorizes the imposition of certain sanctions on those deemed to be in violation thereof. Defendant correctly asserts that Carpenter was not in violation of the Act while operating the car, since he was in lawful possession of it, and thus was an "insured" under plaintiff Wilfong's policy, which met the financial requirements of G.S. 20-279.1(11). Defendant also correctly contends that while the

Wilfong v. Wilkins, Com'r of Motor Vehicles

Commissioner is empowered by G.S. 20-279.5 to suspend the driving privileges of motor vehicle owners and operators who are involved in accidents resulting in personal injury, death or property damage exceeding \$500, even though fault has not been determined, when his office has no proof of their financial responsibility within a certain time after the accident occurs, Carpenter was not subject to such a suspension because G.S. 20-279.6(1) provides that the security requirements of G.S. 20-279.5 do not apply when no injury or damage is done to anyone other than the operator or owner of the vehicle. And it is also true, as defendant maintains, that G.S. 20-279.21(b)(4)(e) does not require liability insurance policies issued under the Act to insure against loss "to property owned by, rented to, in charge of, or transported by the insured." Nevertheless, these statutes, which have nothing to do with unsatisfied judgments in automobile cases, do not justify us concluding that the General Assembly did not intend that which is plainly stated in G.S. 20-279.13. A statute as free from ambiguity as G.S. 20-279.13 is requires no construction, only adherence. Under the record presented, the statute required defendant to automatically suspend Carpenter's license to operate a motor vehicle upon receiving certification that the judgment against him was unsatisfied, and the order of mandamus was correctly entered.

Defendant's other contentions—relating to a possible coverage dispute under plaintiff Wilfong's policy and the status of Harleysville Mutual Insurance Company's alleged status as a subrogee of Wilfong—are outside the record and will not be considered. The terms of Wilfong's insurance policy, except that they comply with the state's financial responsibility laws, were not mentioned in the court below and are not in the record; and the only mention of Harleysville Mutual Insurance Company in the stipulated facts is that it is the company plaintiff Wilfong obtained her policy through.

Affirmed.

Judges WEBB and JOHNSON concur.

Brower v. Brower

JUDY F. BROWER v. RICHARD DWIGHT BROWER

No. 8319DC696

(Filed 21 August 1984)

Divorce and Alimony § 24.4— enforcement of child support award—present ability to pay—imprisonment for contempt improper

Before a previous child support order can be enforced by a civil contempt order directing a defendant's imprisonment until the contempt order is complied with, it must first be established that defendant *then* has the ability to comply with the order of contempt; therefore, the trial court erred in ordering defendant's imprisonment for continuing civil contempt until he paid \$10,590 in child support arrearages, since the court's order was supported only by a finding that defendant had the present ability to pay a portion of that sum.

APPEAL by defendant from *Hammond, Judge*. Order entered 2 June 1983 in District Court, RANDOLPH County. Heard in the Court of Appeals 12 April 1984.

On 15 July 1977, in a prior action between the same parties in the same court, defendant appellant signed a voluntary support agreement in which he agreed to pay \$80 every two weeks for the support of his three children. This agreement, approved by a District Court judge in accord with G.S. 110-133, has the same force and effect as though entered by the court to start with. Defendant, who has failed to make many of the payments ordered, has been found in civil contempt and jailed on four different occasions. The first imprisonment began on 21 November 1978, when the court ordered him imprisoned until he paid the \$1,680 that was then due; but he was released four weeks later upon motion of the Department of Human Resources so that he might start a job. The second imprisonment began on 14 January 1980 when the arrearage amounted to \$4,010 and he was released upon a similar DHS motion three and a half months later. The third imprisonment began 17 July 1980 when he was \$5,210 in arrears and he was released after being incarcerated for three months. But in neither instance did defendant pay the arrearage due nor any significant part of it, though each imprisonment order directed that he be confined until the full amount due was paid.

On 29 July 1982, a fourth civil contempt hearing was begun, but was continued to enable defendant to obtain evidence in support of his claim that he was disabled and seeking Social Security

Brower v. Brower

benefits. On 16 September 1982, when the hearing was resumed, defendant failed to appear and the court ordered his seizure and imprisonment pending a further hearing on the merits. Defendant's latest imprisonment began on 26 May 1983, when he turned himself in to the sheriff.

In a hearing held on 2 June 1983, the court found defendant in contempt for failing to appear at the continued contempt hearing and for failing to make the payments earlier directed, and ordered defendant's imprisonment until the total arrearage due in the amount of \$10,590 is paid. The court's findings of fact concerning the defendant's financial status at that time were as follows:

(9) That the Defendant testified in open court as follows:

- (a) That he had been gainfully employed as a truck driver in High Point, North Carolina, where he earned \$150.00 per week.
- (b) That he had earned funds which he could have applied to his child support payments, but he chose to do otherwise.
- (c) That, since early 1982 when he recovered from the gunshot wound, he has not been under any physical or mental disability.
- (d) That, although he had no liquid assets, he had resources upon which to call to make at least a portion of his child support payments.
- (e) That for the last three months he had not worked because he had been out-of-state in an attempt to avoid criminal process.

Smith, Casper & Smith, by Archie L. Smith, Jr., for plaintiff appellee.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for defendant appellant.

PHILLIPS, Judge.

Defendant's appeal is from an order of civil contempt confining him to prison until past due child support payments amount-

Brower v. Brower

ing to \$10,590 are paid. The order is without legal sanction, in our opinion, and must be vacated.

The difference between civil contempt and criminal contempt has been noted in several decisions of our Supreme Court. In essence, criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way. *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966). And as is the case with all offenses of a criminal nature, the punishment that courts can impose therefor, either by fine or imprisonment, is circumscribed by law. See G.S. 5A-12. Civil contempt, on the other hand, is employed to coerce disobedient defendants into complying with orders of court, and the length of time that a defendant can be imprisoned in a *proper* case is not limited by law, since the defendant can obtain his release immediately upon complying with the court's order. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). The necessity of a defendant being able to comply with an order of civil contempt is made plain by the following provisions of the General Statutes:

§ 5A-21. Civil contempt; imprisonment to compel compliance.

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order.

§ 5A-22. Release when civil contempt no longer continues.

(a) A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt.

Thus, before a previous child support order can be enforced by a civil contempt order directing a defendant's imprisonment until

DesMarais v. Dimmette

the contempt order is complied with, it must first be established that the defendant *then* has the ability to comply with the order of contempt. *Hodges v. Hodges*, 64 N.C. App. 550, 307 S.E. 2d 575 (1983); *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E. 2d 786 (1980).

Though the order appealed from requires defendant's imprisonment for continuing civil contempt until he pays \$10,590, it is supported only by a finding that he had the present ability to pay a portion of that sum. A similar order was struck down by our Supreme Court in *Green v. Green*, 130 N.C. 578, 41 S.E. 784 (1902). Since the same law still abides, the order in this case must also be vacated. The case is remanded to the District Court for further proceedings consistent with this opinion.

Vacated and remanded.

Judges HEDRICK and ARNOLD concur.

REBECCA DIMMETTE DESMARAIS, EXECUTRIX AND TRUSTEE OF THE ESTATE OF NANNIE H. DIMMETTE AND EXECUTRIX OF THE ESTATE OF L. E. DIMMETTE AND DULCIE DIMMETTE BARLOW, EXECUTRIX AND TRUSTEE OF THE ESTATE OF NANNIE H. DIMMETTE AND EXECUTRIX OF THE ESTATE OF L. E. DIMMETTE, PLAINTIFFS v. JOEL H. DIMMETTE, INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE OF THE ESTATE OF NANNIE H. DIMMETTE AND AS EXECUTOR OF THE ESTATE OF L. E. DIMMETTE, GREEN MOUNTAIN DEVELOPMENT CORPORATION, FIDELITY INSURANCE AGENCY, INC., AND DIMMETTE REALTY CORPORATION, DEFENDANTS v. NANE DIMMETTE SPAINHOUR AND LAUDIE DIMMETTE PORTER, THIRD-PARTY DEFENDANTS

No. 8326SC666

(Filed 21 August 1984)

1. Appeal and Error § 6.3— change of venue denied—order appealable

An order denying change of venue was appealable, since an erroneous order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be corrected if no appeal were allowed before the final judgment.

2. Executors and Administrators § 39— proper venue in actions against executor—place of executor's appointment

Where plaintiffs sought an accounting by defendant as executor of two estates in which he had qualified in Caldwell County, and plaintiffs also sought to have defendant removed as executor of both estates, the trial court erred in

DesMarais v. Dimmette

denying defendant's motion for change of venue to Caldwell County, since G.S. 1-78 provides that an action against an executor in his official capacity must be instituted in the county in which he qualified.

APPEAL by defendants from *Griffin, Judge*. Order entered 31 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 April 1984.

The defendants appeal from an order denying a change of venue. The plaintiffs alleged seven causes of action composed of ten claims against the defendants. The claims allegedly arose from Joel H. Dimmette's actions as an officer in two corporations and as executor of two estates. The plaintiffs prayed for money judgments and various decrees involving the corporations. They also prayed that Joel H. Dimmette be required to account for his actions as executor of the two estates and that he be removed as executor of the two estates. Defendant Joel Dimmette had been appointed executor of the two estates in Caldwell County.

The plaintiffs filed a motion for a preliminary injunction and defendant Dimmette entered into a consent order in which he agreed to maintain the status quo of the two corporations for a period of 60 days. This order was later extended by consent to the time of trial. Prior to filing an answer, the defendants made a motion to move the case to Caldwell County. After making the motion for a change of venue, defendant Dimmette filed an answer.

The motion for a change of venue was denied. Defendant Dimmette appealed.

Helms, Mulliss and Johnston, by Norvin K. Dickerson, III, for plaintiff appellees.

West, Bingham, Delk and Swanson, by Ted G. West, David A. Swanson, and Joseph C. Delk, III, for defendant appellants.

WEBB, Judge.

[1] The order denying the motion for change of venue does not dispose of the case. It is an interlocutory order and the first question we face is whether the appeal should be dismissed as premature. *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). Under G.S. 1-277, an interlocutory order which will work injury if not corrected before final judgment is ap-

DesMarais v. Dimmette

pealable. See *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967). We hold that an erroneous order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment. The order in this case denying a change in venue is appealable. *Coats v. Hospital*, 264 N.C. 332, 141 S.E. 2d 490 (1965) and *Klass v. Hayes*, 29 N.C. App. 658, 225 S.E. 2d 612 (1976).

G.S. 1-78 provides:

"All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county."

[2] Under this section of the statute, if an action is against an executor in his official capacity, it must be instituted in the county in which he qualified. See *Stanley v. Miller*, 42 N.C. App. 232, 256 S.E. 2d 308 (1979). A part of the relief sought in this case was an accounting by the defendant as executor in two estates in which he had qualified in Caldwell County. The plaintiffs also sought to have the defendant removed as executor of both estates. The action is against the defendant in his official capacity in both estates and it was error not to allow his motion that it be transferred to Caldwell County.

The plaintiffs argue that there has been no abuse of discretion and the court was not required under G.S. 1-83 to remove the matter to Caldwell County. The court in this case had no discretion. G.S. 1-78 says the case "must be instituted" in Caldwell County and the court was required to remove the case to that county. The plaintiffs rely on *Pushman v. Dameron*, 208 N.C. 336, 180 S.E. 578 (1935), which holds that an action against an executor may be moved to another county after it has been filed in the county in which he was qualified. We do not believe *Dameron* is precedent for this case. In this case the action was not filed in the county in which the statute requires it to be filed.

The plaintiffs argue that the defendant waived his right to a change of venue by consenting to a preliminary injunction. G.S.

Bomer v. Campbell

1A-1, Rule 12(b), (g) and (h) provide that a defense of improper venue is waived if it is not made before or as part of a responsive pleading. In this case, the motion for a change of venue was made before the answer was filed. The defendant did not waive this defense.

Reversed and remanded.

Judges HILL and WHICHARD concur.

DIXIE ANN BOMER v. TIMOTHY ROBERT CAMPBELL

No. 8330SC892

(Filed 21 August 1984)

1. Partition § 6.1— necessity for sale rather than partition

The trial court did not err in ordering that property owned by the parties as tenants in common be sold rather than divided in kind, since the court's conclusion that an actual division could not be made without injury to one or both of the co-tenants was supported by competent evidence, including evidence that the property consisted of two tracts, one an unimproved lot a little over two acres in size and the other a lot about an acre and a half in size with a two-bedroom house on it.

2. Judicial Sales § 3— resale of property—bond in amount of high bid—requirement improper

The clerk of superior court erred in requiring the highest bidder at a resale of property to deposit a cash bond in the amount of the bid, since there was no finding that such a deposit was necessary. G.S. 1-339.25(a) and (c).

APPEAL by respondent from *Howell and Kirby, Judges*. Orders entered 4 October 1982 and 14 April 1983 in Superior Court, JACKSON and MACON Counties. Heard in the Court of Appeals 10 May 1984.

This is a proceeding to partition and sell two adjoining tracts of Jackson County real estate amounting to about 3.65 acres altogether, which the parties own as tenants in common. The lots are situated in a subdivision known as Paradise Mountain; one lot, a little over two acres in size, is unimproved, while the other lot, about an acre and a half in size, has a two bedroom house on it.

Bomer v. Campbell

Petitioner alleged that because of its size and nature the property cannot be partitioned in kind without injury to the parties; but respondent denied this allegation and asked that the property be divided between them. Following a hearing before the Clerk of Superior Court, a sale of the property was ordered and a Commissioner appointed to accomplish it. Upon appeal to, and a *de novo* hearing by, the judge of Superior Court, a similar order was entered and the matter returned to the Clerk's office. The Commissioner then proceeded to sell the property at an advertised public sale on 10 February 1983, and the last and highest bid therefor was \$25,000, submitted by the petitioner; but within ten days thereafter an upset bid in the amount of \$28,000 was submitted by respondent and a resale ordered. In ordering the resale, however, the Clerk of Superior Court also directed that "the highest bidder at the sale shall submit a cash bond in the sum of his bid, pursuant to North Carolina General Statute 1-339.25(c)." At the resale conducted on 15 March 1983, the last and highest bid was \$40,000 submitted by petitioner; and no upset bid being made within the time allowed, the Clerk entered an order on 28 March 1983 confirming the sale to petitioner at that price.

The respondent objected to the order of confirmation, as well as the various orders leading to it, and further manifested his opposition to the course that the case had taken by moving and petitioning the Clerk not to confirm the sale, to rescind the order requiring a cash bond of the high bidder, and to permit him to submit an upset bid unaccompanied by a cash deposit; but the Clerk declined to rule on respondent's motion and petition. In appealing the Clerk's action and failure to act to the Superior Court judge, respondent also filed a motion for relief from the Clerk's orders under the provisions of Rule 60 of the N.C. Rules of Civil Procedure; after a hearing, respondent's motions, petition, and objections were all overruled by Judge Kirby and the sale of the property to petitioner for \$40,000 was confirmed.

Hunter, Large & Kirby, by Gary E. Kirby, for petitioner appellee.

Jones, Key, Melvin & Patton, by Richard Melvin, for respondent appellant.

Bomer v. Campbell

PHILLIPS, Judge.

[1] Respondent's first contention is that the court erred in ordering that the property be sold rather than divided in kind. This contention is overruled. The trial court's conclusion that an actual division of the property cannot be made without injury to one or both of the co-tenants is abundantly supported by the findings made, which in turn are supported by competent evidence. Thus, the order of sale is authorized under the provisions of G.S. 46-22, and is binding upon us. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). Indeed, the size and nature of the two tracts involved, with one lot having a two bedroom house on it, and the other lot, not much bigger, being unimproved, would seem to have made the court's conclusion that a sale was necessary almost inevitable. In all events, this question of fact was determined against the respondent according to law and cannot be disturbed. *Phillips v. Phillips*, 37 N.C. App. 388, 246 S.E. 2d 41, *cert. denied*, 295 N.C. 647, 248 S.E. 2d 252 (1978).

And the respondent's second contention, which concerns certain alleged equities between the parties, requires no consideration, since that issue is not now before us. The record shows that the equities between the parties have not yet been determined and will not be until after the sale is completed and the funds are in hand, ready for distribution. Thus, this contention is premature.

[2] But the respondent's contention that the Clerk's order requiring a cash bond of the high bidder was erroneous is well taken. Implicit in the authority that G.S. 1-339.25(c) gives Clerks of the Superior Court to require the highest bidder at a resale of property to deposit a cash bond is the requirement that there be some justifiable basis for such an order; otherwise, the discretionary power that the statute gives Clerks in such matters would be unbridled and subject to neither legal review nor remedy. Such is not our law. The general policy of our law favors maximum bidding at judicial sales; and requiring a cash bond in the full amount of the bid, rather than the 5% or so usually deposited under G.S. 1-339.25(a), obviously tends to inhibit bidding when a substantial amount, such as \$28,000, has already been bid. It is a matter of common knowledge that few people in this state are capable of depositing \$30,000 or \$40,000 in cash for any pur-

Alliance Mutual Ins. Co. v. N. Y. Central Ins. Co.

pose, fewer still can do so without the inconvenience and expense of converting holdings or borrowing from the bank, and not everyone capable of and interested in buying property is willing to go to such inconvenience and expense just to make a bid that might not be acceptable. Yet the Clerk's order requiring a cash bond in the amount of the bid contained no finding that such a deposit was necessary; and nothing in the record suggests that such a finding would have been proper if it had been made. Thus, on this record, it was an abuse of discretion on the Clerk's part to require such a bond and it was error on the Judge's part not to grant respondent relief from it.

The court's order confirming the sale of the property to petitioner is therefore vacated and this matter is remanded to the Superior Court for a continuation of the sale process in accord with the provisions of this opinion and the other laws pertaining thereto. The petitioner's \$40,000 bid is not being disturbed, but shall remain in effect under the laws governing such matters until the sale is either confirmed at that price or an upset bid is filed. The respondent or anyone else who desires to do so shall be permitted to upset petitioner's bid by complying with the provisions of G.S. 1-339.25(a) within ten days after the certification of this decision to the Jackson County Superior Court.

Vacated and remanded.

Judge ARNOLD concurs.

Judge HEDRICK concurs in result.

ALLIANCE MUTUAL INSURANCE COMPANY v. NEW YORK CENTRAL
MUTUAL FIRE INSURANCE COMPANY

No. 8318SC861

(Filed 21 August 1984)

Insurance § 93— excess insurance clause—no primary or excess policy—coverage prorated

Where insured was covered by policies executed by plaintiff and defendant and neither policy was primary or excess, the excess insurance clauses in

Alliance Mutual Ins. Co. v. N. Y. Central Ins. Co.

the policies were mutually repugnant, and coverage for the insured accident was properly prorated.

APPEAL by defendant from *Smith, Judge*. Judgment entered 11 May 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 May 1984.

The defendant appeals from a judgment requiring it to pay one-half the amount which the plaintiff had paid on a liability insurance claim. The parties stipulated to the following facts upon which the superior court decided the case. Alliance Mutual Insurance Company had a liability insurance policy in force on 1 June 1980 covering liability for Max and Phyllis Barrow for accidents involving watercraft. On the same date, New York Central Mutual Fire Insurance Company had in force a liability insurance policy covering Charles and Mary Jessup and any member of their household for liability for accidents by watercraft. Each policy contained a provision identical to a provision in the other policy which provided that the coverage "shall be excess insurance over any other valid and collectible insurance available to the Insured."

On 1 June 1980, Ricky Jessup, the son of Charles and Mary Jessup, was operating a boat with a 170 horsepower engine, owned by Max Barrow, which was involved in an accident. Ricky Jessup was an insured under both policies. Alliance settled a liability claim against Ricky Jessup for \$13,000.00 which was a fair and reasonable settlement. Alliance called on New York to pay it one-half the amount paid in settlement of the claim, which New York refused to do.

The superior court held, based on the stipulated facts, that the two insurance policies "contained identical excess insurance clauses and such clauses are mutually repugnant in this case and must be disregarded" A judgment was entered for \$6,500.00 plus interest against the defendant. The defendant appealed.

Perry C. Henson and Jack B. Bayliss, Jr. for plaintiff appellee.

Tuggle, Duggins, Meschan and Elrod, by Sally A. Lawing, for defendant appellant.

Alliance Mutual Ins. Co. v. N. Y. Central Ins. Co.

WEBB, Judge.

The defendant, relying on *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967); *Insurance Co. v. Casualty Co.*, 269 N.C. 354, 152 S.E. 2d 445 (1967); and *Insurance Co. v. Continental Casualty Co.*, 54 N.C. App. 551, 284 S.E. 2d 211 (1981), argues that in every case in which the superior court has ordered proration on the basis of mutual repugnance of excess insurance clauses, such rulings have been reversed when appealed. The defendant contends the proper inquiry is "which of the two policies is primary and which is excess." We agree with the defendant that this is the proper inquiry. When this inquiry leads to the conclusion, however, that neither policy is primary or excess, we must hold that the clauses are mutually repugnant and the coverage must be prorated. Where, as here, the excess insurance clauses are identical in language, we do not see how we can hold the coverage of either company is primary or excess. We affirm the judgment of the superior court.

The defendant contends that the plaintiff's coverage is primary because the excess insurance clause in its policy was not intended to apply to the watercraft coverage. Defendant says this is so because the policy as originally issued to the Barrows excluded liability coverage for any watercraft having a motor of more than 50 horsepower. The Barrows had purchased a watercraft endorsement which provided that liability coverage "is extended to apply to . . . ownership . . . of watercraft . . . exceeding fifty horsepower." The boat which was involved in the accident in this case had an engine of 170 horsepower. The defendant argues that the excess insurance clause in the Alliance policy applies to the basic policy and does not apply to the endorsement. It says the Barrows purchased additional coverage and by doing so, they intended to purchase primary coverage. We do not believe we can read such an intent into the action of the Barrows. They had an endorsement added to their policy which extended the coverage to watercraft with more than 50 horsepower engines. We read nothing in the policy which says the excess clause does not apply. We believe the Barrows wanted the additional protection. So long as they received it, they did not care whether it was through primary or excess coverage.

Crumbley v. Crumbley

The defendant cites *Auto Owners Ins. Co. v. Northstar Mut. Ins. Co.*, 281 N.W. 2d 700 (Minn. 1979). We are not bound by that case and do not follow it.

Affirmed.

Judges HILL and WHICHARD concur.

PATRICIA CRUMBLEY v. CHARLES WILLIAM CRUMBLEY

No. 8327DC886

(Filed 21 August 1984)

Divorce and Alimony § 21.9— property devised to party by father—separate property—no equitable distribution

The trial court did not err in concluding that part of a lot was defendant's separate property not subject to equitable distribution where the court found that the lot was originally defendant's separate property, having been devised to him by his father; part of the lot received back from defendant's mother was in exchange for that separate property; the conveyance contained no statement expressing an intention for the part conveyed to be regarded as marital property; and the fact that the conveyance back from defendant's mother was to both parties was immaterial. G.S. 50-20(b)(2).

APPEAL by plaintiff from *Phillips, J. Ralph, Judge*. Judgment entered 8 June 1983 in District Court, GASTON County. Heard in the Court of Appeals 10 May 1984.

The parties married in 1962, separated in 1980, and were divorced in this action in 1982. Thereafter, by separate judgments, the trial court undertook to equitably distribute the personal and real property owned by the parties. The disposition made of the personal property was not objected to by either party; and plaintiff's appeal from the judgment distributing the real property challenges only the determination that a house and lot situated at 203 Bessemer City Road in Gastonia is defendant's separate property and therefore not subject to equitable distribution under the provisions of G.S. 50-20 and G.S. 50-21.

The circumstances relating to this question follow: In 1968, defendant was devised the house and lot in question by the will of

Crumbley v. Crumbley

his father and by the same instrument his brother, Floyd, received an adjoining house and lot situated at 201 Bessemer City Road. In 1972, they discovered that, due to an earlier surveying mistake, part of Floyd's house was situated on defendant's lot. Their mother, who was interested in an amicable and expeditious resolution of this problem, told defendant she would deed him some other land to make up for it if he would deed Floyd the part of lot 203 that Floyd's house and yard were on. In furtherance of this plan, defendant deeded lot 203 to her, she in exchange deeded the part needed by Floyd to him, and deeded the rest of the lot to defendant and plaintiff as husband and wife. In 1974, defendant's mother also deeded a .38 acre parcel of land behind lot 203 to him and plaintiff as husband and wife. Shortly thereafter, plaintiff and defendant bought lot 201 from his brother. In the judgment of equitable distribution, the court found facts substantially as above stated and concluded that (1) lot 201 was marital property, since the parties purchased it during their marriage; (2) the .38 acre parcel behind lot 203 received from defendant's mother was marital property because it was a gift to the parties during the marriage; and (3) the residue of lot 203 was his separate property, though the deed therefor was in the names of both parties, since it was received in exchange for the separately owned lot conveyed earlier to his mother.

Guller and Kakassy, by Thomas B. Kakassy, for plaintiff appellant.

Frank Patton Cooke, by H. Randolph Sumner, for defendant appellee.

PHILLIPS, Judge.

The evidence upon which the judgment appealed from is based was not brought forward in the record. It must be presumed, therefore, that the findings of fact made by the trial judge are supported by competent evidence. *Carter v. Carter*, 232 N.C. 614, 61 S.E. 2d 711 (1950). In concluding from the facts found that the property located at 203 Bessemer City Road is the defendant's separate property and therefore not subject to equitable distribution, the court only did what our Equitable Distribution Act required, and the judgment is affirmed.

Crumbley v. Crumbley

"Separate property" of a spouse as defined by G.S. 50-20(b)(2) is not subject to equitable distribution. Under that statute, property acquired by a spouse by bequest, devise, or descent is that spouse's "separate property," and "[p]roperty acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance." Thus, under the express terms of G.S. 50-20(b)(2), the property involved is defendant's "separate property," and that the conveyance back from his mother was to both parties is immaterial. The whole lot was his "separate property" to start with, since it was devised to him by his father; the part received back was in exchange for that separate property; and the conveyance contained no statement expressing an intention for the part conveyed to be regarded as marital property.

Affirmed.

Judges HEDRICK and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 AUGUST 1984

APPALACHIAN STOVE v. DUNN No. 8328SC821	Buncombe (82CVS2223)	Reversed & Remanded
BIELINSKI v. BIELINSKI No. 8321DC1114	Forsyth (82CVD0458)	Reversed & Remanded
E. F. HUTTON & CO. v. SEXTON No. 8326SC896	Mecklenburg (77CVS4385)	No Error
IN RE BELK No. 8326SC992	Mecklenburg (82CVS3414)	Affirmed
LAMB v. SOUTHERN RAILWAY CO. No. 8311SC532	Lee (80CVS0809)	Affirmed
S.R.M. REALTY v. WEBSTER No. 8310DC756	Wake (82CVD2585)	Affirmed
STATE v. ATKINSON No. 835SC1017	New Hanover (82CRS15728)	New Trial
STATE v. JOINES No. 831SC700	Dare (82CRS5426) (Originally filed in Currituck County No. 81CRS2843)	No Error
STATE v. PEMBERTON No. 8319SC1144	Montgomery (83CRS168)	No Error

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

CAROL M. THOMPSON v. DONALD O. THOMPSON; L & O, INC., A CORPORATION; AND ROBERT B. PRYOR, TRUSTEE AND STEPP, GROCE, PINALES & COSGROVE, A PARTNERSHIP v. CAROL M. THOMPSON

No. 8329DC578

(Filed 4 September 1984)

1. Attorneys at Law § 7.1; Contracts § 6— domestic relations case—contingent fee agreement—void as against public policy

A contract for the payment of a fee to an attorney contingent upon the securing of a separation or divorce or contingent in amount upon the amount of alimony, support or property settlement obtained is void as against public policy.

2. Attorneys at Law § 7.1; Quasi Contracts and Restitution § 1.2— void contingent fee contract—recovery in quantum meruit

Although a contingent fee contract in a domestic relations case was void as against public policy, plaintiff attorneys were entitled to recover in *quantum meruit* for the reasonable value of their services as of the date they were discharged by defendant client. However, the reasonable value of those services must be determined without consideration of the amount plaintiffs would have received under the contingent fee contract.

Judge HEDRICK dissenting.

APPEAL by defendant from *Gash, Judge*. Judgment entered 4 January 1983 in District Court, HENDERSON County. Heard in the Court of Appeals 5 April 1984.

This appeal involves a contingent fee contract entered into by the defendant, Carol M. Thompson and the intervenor-plaintiff law firm, Stepp, Groce, Pinales & Cosgrove in connection with a contemplated domestic relations action against plaintiff's then-husband, Donald O. Thompson. The intervenor law firm agreed to represent Mrs. Thompson in early January, 1981. The contingent fee contract at issue was executed on 27 January 1981. Shortly thereafter, Mrs. Thompson discharged the intervenor law firm and secured other counsel to pursue her domestic case.

The underlying domestic action was then instituted on 27 February 1981 by Carol Thompson against Donald Thompson and L & O, Inc., a family business, seeking alimony, alimony *pendente lite*, and the setting aside of certain purportedly fraudulent conveyances and stock transfers involving the family business and properties. On 12 March 1981, the law firm of Stepp, Groce,

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

Pinales & Cosgrove filed a motion to intervene in the action between Mrs. Thompson and her husband. In their motion, the intervenors alleged that they were the discharged attorneys of the plaintiff, Mrs. Thompson, and that they had a one-fourth contingent fee contract with her which gave them a proprietary interest in the subject matter of Mrs. Thompson's suit against her husband, and further, that they were entitled to a percentage of that recovery.

The motion was resisted by Mrs. Thompson; however, the District Court judge allowed the law firm to intervene "in its discretion under the permissive right to intervene provisions of Rule 24 of the Rules of Civil Procedure." Accordingly, the intervenor-plaintiffs served on Carol Thompson a complaint, filed 13 March 1981, which alleged, *inter alia*, that an offer to settle the Thompson case was made to Mrs. Thompson by Mr. Thompson's attorney, Mr. Boyd Massagee, Jr., by letter on 9 February 1981 and that based upon their contingent fee contract, intervenors were entitled, as discharged attorneys, to one-fourth of the value of this offer.

Thereafter, the domestic case proceeded between the Thompsons and the case in intervention proceeded between Mrs. Thompson and her former attorneys. The Thompsons eventually settled their domestic case by two court orders. Discovery was had in the suit in intervention and both sides filed motions for summary judgment, which were denied by the trial court.

On 27 October 1981, plaintiff filed a motion to amend her answer to allege certain affirmative defenses and to request a jury trial. Plaintiff's motion was denied in its entirety, as was her additional motion to compel discovery relative to the question of the reasonable value of the services rendered by intervenors.

When the case was called for trial as a non-jury matter on 19 October 1982, the defendant made an oral motion to dismiss the intervenors' action. The motion was denied and evidence was received by the court. Defendant's motions for involuntary dismissal at the close of the intervenor's evidence and at the close of all the evidence were both denied. From a judgment entered in favor of the intervenor law firm in the amount of \$47,500, defendant appeals.

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

Lentz, Ball & Kelley, P.A., by Ervin L. Ball, Jr., for defendant appellant.

Stepp, Groce, Pinales & Cosgrove, by Edwin R. Groce and W. Harley Stepp, Jr., for intervenor appellees.

JOHNSON, Judge.

The central question presented by this appeal is whether the contingent fee contract sued upon by the intervenor law firm in this domestic action between a wife and husband is enforceable. For the reasons set forth below, we hold that a contract for the payment of a fee to an attorney contingent upon the securing of a separation or divorce or contingent in amount upon the amount of alimony, support or property settlement obtained is void as against public policy.

I

The evidence offered at trial may be summarized as follows: Mr. and Mrs. Thompson were married in 1953 and up to the time of their divorce in March, 1982 were involved in the business of construction and land development. The couple did business through a corporation known as L & O, Inc., named as a party defendant in the original suit, in which Mrs. Thompson had a 49% ownership interest and Mr. Thompson a 51% ownership interest. Mr. and Mrs. Thompson also owned equal interests in a partnership known as Haywood Knolls. The Thompsons were very successful in their various enterprises. Haywood Knolls consisted primarily of land held for development purposes and was valued at approximately 1.5 million dollars, with an indebtedness of approximately one-half million dollars at all relevant times. The couple's total equity in all of their properties was substantially in excess of two million dollars in December of 1980, the month that Mr. Thompson left his wife.

In December, 1980, Mrs. Thompson purportedly conveyed certain real property to Mr. Thompson and to certain trusts after being told by him that the conveyances were for estate planning and tax reasons. Mr. Thompson also either caused Mrs. Thompson to sign a number of deeds in blank, or forged her name to such deeds, purportedly conveying some of their real estate holdings to himself. Later that month, while Mrs. Thompson was vacation-

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

ing in Florida, Mr. Thompson, among other things, withdrew approximately \$500,000 in cash from various joint bank accounts, and put the money into his individually-owned accounts. Upon Mrs. Thompson's return from Florida, she found that Mr. Thompson had removed himself from the marital home; he also announced that he was no longer going to live with her. In early 1981, Mrs. Thompson discovered her husband's financial manipulations. It is against this background that Mrs. Thompson sought an attorney with the law firm of Stepp, Groce, Pinales & Cosgrove.

Mrs. Thompson met with Mr. Stepp of the intervenor law firm for the first time on 5 January 1981. Soon thereafter, Mrs. Thompson prepared statements, at Mr. Stepp's request, showing the financial worth of herself and her husband. In addition, she provided copies of all the pertinent real estate documents her husband had recorded at the Henderson County Courthouse, tax listing sheets and other information. Three or four meetings were held during the next three weeks between Mr. Stepp and Mrs. Thompson regarding the suit.

Mr. Stepp testified that he discussed the matter of fees with Mrs. Thompson during their first meeting. According to Stepp, he gave Mrs. Thompson a choice between a flat fee and a contingent fee arrangement and advised her to think about it further. Mrs. Thompson, to the contrary, testified that the first time a fee was discussed between Mrs. Thompson and Mr. Stepp was on 26 January 1981, and at that time she was given a choice between an hourly rate or a one-fourth fee contingent upon the amount secured by settlement or other judicial disposition of the case; she chose the latter. A written fee contract was executed on 27 January 1981.

Mr. Thompson was then represented by Mr. Boyd B. Massagee, Jr., an attorney practicing in Henderson County. Mr. Massagee testified that immediately after receiving Mr. Stepp's first letter of 9 January 1981, the two attorneys began discussing a settlement of the Thompson case. A number of proposals were made and the same day that the fee contract was executed, 27 January 1981, Mr. Massagee received a detailed letter from Mr. Stepp containing an offer to settle the Thompson case. Mr. Stepp received a reply from Mr. Massagee on or about 9 February 1981. Mr. Stepp and Mrs. Thompson were in touch by telephone from 27 January to 9 February 1981.

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

Mrs. Thompson went to Mr. Stepp's office on or about 9 February 1981 to discuss the settlement proposed by Mr. Massagee. Mrs. Thompson testified that she did not state that she would agree to the proposal but that she wanted to think about it, and further, that Mr. Stepp and his law partner, Mr. Edwin A. Groce, advised her that they believed this was the best settlement she could get out of court.

On direct examination, Mr. Stepp testified that Mrs. Thompson told him in unequivocal terms that the offer was acceptable to her. However, on cross-examination Stepp admitted that Mrs. Thompson did not sign any document indicating her acceptance of the Massagee proposal and characterized the proposal in the following terms:

I considered what we had from Mr. Massagee as a basic ground level proposition for us to start to elaborate on. It was the framework from which we could work around to a final solution for her.

Mr. Stepp also testified that he urged Mrs. Thompson to fully evaluate the proposal to determine whether it adequately protected her interests.

The amount offered in the Massagee proposal was somewhat more than one million dollars. Mrs. Thompson discussed the offer with various friends and a relative, one of whom suggested that if she was not satisfied with the offer, she should hire another attorney and discharge Stepp. That individual recommended Mr. Robert Whitmire of the Henderson County Bar. Thereafter, Mrs. Thompson discharged Mr. Stepp, collected her file, and hired Mr. Whitmire to represent her.

Mr. Stepp testified that his office kept no records of the time spent on the Thompson file, of telephone calls or of conferences. Mr. Stepp could not estimate the total time spent during his firm's thirty-day representation of Mrs. Thompson, although he guessed that it could be as high as 200 hours. Both Stepp and Massagee believed the Thompson case to be both complicated and complex, presenting questions involving the law of partnership, trusts, fraud, alimony, child custody, support, joint bank accounts and the confidential relationship between husband and wife.

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

Mrs. Thompson testified that she discharged Mr. Stepp because she felt that he was pressuring her to accept her husband's offer of 9 February 1981. Mrs. Thompson was dissatisfied with the terms of the offer. Mr. Whitmire, who began representing Mrs. Thompson on or about 16 February 1981, instituted a lawsuit for her on 27 February 1981 against Mr. Thompson and the parties' corporation, L & O, Inc. The Thompson case was subsequently litigated and culminated in a final settlement on 9 September 1981. Mrs. Thompson ultimately paid her attorney, Robert Whitmire, \$37,500 for the services he rendered in the domestic action.

The trial court's findings of fact are generally reflective of the foregoing summary; the controverted issues of fact as to the time when fees were first discussed and whether the 9 February 1981 offer was accepted by defendant, however, were resolved against defendant and in favor of the plaintiff law firm. In essence, the trial court found and concluded that the law firm of Stepp, Groce, Pinales & Cosgrove did a considerable amount of work in a complex case on behalf of Mrs. Thompson during the period from 5 January 1981 to 16 February 1981, culminating in the 9 February 1981 offer of some one million dollars in settlement of the Thompson lawsuit, which offer was "substantially accepted" by Mrs. Thompson prior to her decision to discharge the plaintiff law firm. The court further found and concluded that the fee contract executed by the parties, providing for a contingent fee of one-fourth of any amount recovered by compromise settlement, is fair and reasonable in all respects, including the consideration that Mrs. Thompson "had very little money, if any, to pay an attorney upon a flat fee basis at the time she employed said plaintiff law firm;" that the amount of the fee that said attorneys would be entitled to under that contract is \$250,000; and that using the relevant hourly basis as a guide, a reasonable fee would be at least \$20,000, considering the amount of time involved and the standing of the lawyer. Finally, the court concluded as a matter of law that, taking all the relevant considerations into account, the plaintiff law firm was entitled to \$85,000 as a reasonable attorney fee, less credit for the \$37,500 paid to Mr. Robert L. Whitmire, Jr., the attorney subsequently hired by Mrs. Thompson.

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

II

Defendant primarily challenges the judgment rendered by the trial court on the contingent fee contract by assigning error to the court's order allowing the plaintiff law firm to intervene in her domestic action against her former husband, Donald Thompson. Defendant argues that the order allowing intervention was improper for the following reasons: (a) the fee contract was void as against public policy and therefore unenforceable; (b) the contract sued upon, including the claimed fee, violates the Code of Professional Responsibility and is void; (c) no cause of action was stated in the complaint in intervention; (d) intervention was improper under Rule 24 of the Rules of Civil Procedure; and (e) no cause of action had arisen on the date of intervention, 2 April 1981, as the underlying domestic action was not finally settled until 8 September 1981, when the defendant wife recovered from her former husband. Although we have some reservations as to whether intervention was properly allowed in this case as a purely procedural matter,¹ we need not address each of the defendant's separate arguments as we base our decision in this appeal on the ground that the contract which formed the basis of the intervenor's claim is void as contrary to public policy and therefore unenforceable.

A

[1] In other areas of the law, contingent fee contracts are upheld when they are entered into in good faith, without suppression or reserve of fact or apprehended difficulties, without undue influence, and for reasonable compensation. *Casket Co. v. Wheeler*,

1. Although the plaintiff moved to intervene in the underlying divorce action as a matter of right under G.S. 1A-1, Rule 24(a)(2), the order allowing intervention states that intervention would be allowed in the court's "discretion under the permissive right to intervene . . ." Rule 24(b)(2) allows non-statutory permissive intervention by anyone "When an applicant's claim or defense and the main action have a question of law or fact in common." It is evident that no common question of law or fact existed between the Thompson domestic matter and the discharged intervenor-law firm's action for fees under their contingency fee contract with Mrs. Thompson. Consequently, under express terms of Rule 24(b)(2), it would appear that the trial court had abused its discretion by allowing the law firm's motion to intervene. But see *Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921) (under pre-Rules practice, law firm could properly intervene in client's underlying action to enforce contingency fee contract where necessary to prevent defendant from disposing of funds).

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

182 N.C. 459, 109 S.E. 378 (1921) (action by corporation to recover on account of unpaid subscription to capital stock from former corporate secretary and treasurer); *Covington v. Rhodes*, 38 N.C. App. 61, 247 S.E. 2d 305 (1978), *disc. review denied*, 296 N.C. 410, 251 S.E. 2d 468 (1979) (personal injury action). Such contracts are primarily for the benefit of indigents or those not capable of employing an attorney to protect their rights. *Casket Co. v. Wheeler*, *supra*; *Covington v. Rhodes*, *supra*. The question of the validity of a contingent fee contract in a domestic case is one of first impression in this jurisdiction. However, the longstanding and prevailing view in other jurisdictions is that a fee contract contingent on the securing of a divorce, or contingent in amount on the amount of alimony, support, or property settlement to be obtained, is against public policy and void. 7 Am. Jur. 2d, Attorneys at Law, § 257 (1980); Anno., 30 A.L.R. 188 (1924); *See, e.g. Sobieski v. Maresco*, 143 So. 2d 62 (Fla. App. 1962); *Keller v. Turner*, 153 Mont. 59, 453 P. 2d 781 (1969); *Aucoin v. Williams*, 295 So. 2d 868 (La. App.), *cert. denied*, 299 So. 2d 798 (La. 1974); *McDearmon v. Gordon & Gremillion*, 247 Ark. 318, 445 S.W. 2d 488 (1969); *Osborne v. Osborne*, 384 Mass. 591, 428 N.E. 2d 810 (1981); *Levine v. Levine*, 206 Misc. 884, 135 N.Y.S. 2d 304 (1954).

A thorough and convincing explanation of the universal view that contingent fee contracts in domestic actions are contrary to public policy is contained in the opinion of the Appellate Court of Indiana in *Barelli v. Levin*, 144 Ind. App. 576, 247 N.E. 2d 847 (1969). In that case, the court held that a contingent fee contract to pay an attorney a percentage of "whatever may be recovered" in a divorce action was contrary to public policy and void. The court reviewed the early history of contingent fee contracts and noted that some types of contingent fee contracts were considered champertous at early common law on the grounds that such contracts tend to promote litigation and to multiply lawsuits. *Id.* at 583, 247 N.E. 2d at 850. Nevertheless, recognizing that these contracts were often necessary to provide a means of procuring legal redress to persons who have rights, but not to the financial means to pursue them, modern courts have upheld contingent fee contracts under certain circumstances. *Id.* at 585-86, 247 N.E. 2d at 851.

The court then surveyed the public policy considerations against such contracts in divorce cases that are recognized in

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

decisions throughout the United States. Two basic policy considerations have led courts to invalidate contingency fees in divorce actions: (1) the recognition that these contracts tend to promote divorce and (2) the lack of need for such contracts under modern domestic relations law. As to the tendency to promote divorce, the court quoted the following passage from an earlier Indiana decision:

"An agreement by a woman to pay her attorney any part of the alimony recovered in a suit against her husband for divorce is against public policy and void. . . . 'Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances which otherwise would pass unnoticed.'" (Citations omitted.)

Id. at 586, 247 N.E. 2d at 852-53, quoting *Jordan v. Kittle*, 88 Ind. App. 275, 150 N.E. 817 (1926). The court reasoned further that even if public attitudes toward divorce have changed since these policies were first established, there was good reason to retain the rule in question.

It may well be that a majority of the general public is no longer concerned with whether divorces are socially desirable or undesirable, or whether contracts that are designed to facilitate or promote the granting of divorces are valid. We are not yet ready to say, however, that it is no longer the public policy of the State of Indiana to discourage divorces and to condemn contracts which discourage reconciliations and provide incentives to attorneys to obtain divorces.

Barelli, 144 Ind. App. at 588-89, 247 N.E. 2d at 853.

The second major policy consideration identified by the *Barelli* court is the lack of need for contingent fee arrangements in divorce actions as a financial matter. Indiana, like North Carolina,² provides a statutory mechanism whereby a wronged

2. G.S. 50-13.6 allows the trial court, in its discretion, to award reasonable attorney's fees to an interested party who has insufficient means to defray the ex-

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

wife seeking representation in a domestic action may be assured the financial means by which to employ an attorney. The court reasoned that even if it were inclined to hold that public policy was no longer offended by contracts tending to facilitate or promote divorce, there was no compelling reason or necessity to do so in light of the statutory provision regarding attorney's fees.

No matter how destitute the wife may be, she does not need a contingent fee contract to enable her to employ an attorney. Her ability to employ an attorney is assured by the statute which empowers and requires the court to order the husband to pay both a preliminary fee and a reasonable fee at the time he grants the wife a divorce. Thus there is no necessity, so far as the wife is concerned, for abandoning the rule that a contingent fee contract to pay an attorney a sum equal to a percentage of the alimony or property settlement recovered in a divorce action is contrary to public policy and therefore void. (Footnote omitted.)

Id. at 589, 247 N.E. 2d at 853.

One further relevant policy consideration was identified by the *Barelli* court:

Wives contemplating divorce are often distraught and without experience in negotiating contracts. Should contingent fee contracts between them and the attorneys they employ under such conditions become the usual fee arrangement, charges of overreaching and undue influence will be all too frequent. The public, the legal profession, and the bench would all suffer. We believe all will benefit by maintaining the present public policy of not enforcing such contracts no matter how freely and fairly entered into and how reasonable may be the fee thereby produced. The wise discretion of capable and experienced trial judges (aided by the evidence placed before them by the parties prior to the time the court fixes the fee to be paid by the husband) can be relied upon to assure every attorney an adequate fee and thus assure every wife adequate representation.

pense of an action for custody and support of minor children. Similarly, under G.S. 50-16.4 the trial court may allow reasonable counsel fees to a dependent spouse in actions for alimony at any time that spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3.

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

Id. at 589, 247 N.E. 2d at 853.

All of the public policy considerations identified and discussed by the court in *Barelli* are implicated, to some degree, in the case under discussion, and are reflective of the public policies of this jurisdiction.

It is well established that a promise or contract looking to the future separation of a husband and wife will not be sustained. *Archbell v. Archbell*, 158 N.C. 409, 74 S.E. 327 (1912); *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E. 2d 697 (1968). This is so because "the law looks with disfavor upon an agreement which will encourage or bring about a destruction of the home." *Matthews v. Matthews*, *supra* at 147, 162 S.E. 2d at 699. Hence, such agreements or contracts are held to be void as against public policy and unenforceable in the courts of this state. See generally 3 Strong's N.C. Index 3d, Contracts § 6.2 (1976).

We are persuaded by the reasoning and logic of the *Barelli* court that the interests of the citizens of this state would be best served by adoption of the rule that a contract for the payment of a fee to an attorney contingent upon his procuring a divorce for his client or contingent in amount upon the amount of alimony and/or property awarded is void as against public policy. Therefore, the contract sued upon by the intervenor law firm is unenforceable exclusively by virtue of the fact that it violates the public policy of this state.³

B

[2] The question remaining to be addressed by this appeal is whether the law firm of Stepp, Groce, Pinales & Cosgrove is entitled to any compensation for the legal services rendered on behalf of Mrs. Thompson prior to the firm's being discharged by her on 16 February 1981. We note here that at least one court has held that an attorney serving under a contingent fee contract in a divorce case may not recover the reasonable value of his services, *Baskerville v. Baskerville*, 246 Minn. 496, 75 N.W. 2d 762 (1956). The *Baskerville* court reasoned as follows:

3. Inasmuch as we base our holding on this ground alone, we need not address the question of whether a contingency fee arrangement was financially necessary in order that Mrs. Thompson be able to seek legal redress or whether this particular contract was otherwise fair and reasonable under the circumstances.

Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson

. . . [T]he law does not favor divorce and . . . any agreement for divorce, or any collateral bargaining promotive of it, is unlawful and void.

* * *

Since the illegality of the contingent fee contract rests on the ground that it may govern a lawyer's action in a manner which thwarts public policy, the taint of illegality permeates the entire lawyer-client relationship in a divorce action so that every objection to permitting a recovery on the express agreement applies with equal force to an attempted recovery in quantum meruit. (Citation omitted.) (Footnote omitted.)

Id. at 504, 513, 75 N.W. 2d at 768, 773.

We decline to adopt such a rule in the case under discussion for two reasons. First, although the evidence was conflicting as to when the subject of fees was first discussed, it is undisputed that the contingency fee contract at issue was not executed until 27 January 1981, which was three weeks after the establishment of the attorney-client relationship between the parties. Therefore, the "taint of illegality" did not explicitly permeate that relationship until it was half-way over. Secondly, as this is a case of first impression and the legal status of such contracts had not been conclusively established, we believe that considerations of basic fairness argue in favor of allowing recovery in *quantum meruit* for the reasonable value of the discharged law firm's services as of the date of discharge. See *Covington v. Rhodes, supra* (discharged attorney is entitled to recover reasonable value of services he has already provided); Anno., 92 A.L.R. 3d 690 (1979) (attorney employed on a contingent fee contract discharged without fault on his own part limited to *quantum meruit* recovery).

It is evident from the trial court's findings of fact and conclusions of law that the court considered the size of the fee that the plaintiff attorneys would have received under their contingent fee contract in setting its award of \$85,000 as a reasonable attorney fee. Therefore, the judgment must be reversed and the matter remanded to the trial court for a new trial so that the reasonable value of the services provided defendant by the discharged law firm prior to 16 February 1981 may be determined free of the taint of the unenforceable contingency fee agreement.

Spencer v. Spencer

Reversed and remanded.

Judge HILL concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

I agree with the majority that the contingency fee contract in question is void and unenforceable. Furthermore, it is my opinion the trial judge abused his discretion in entering the order allowing the attorneys to intervene in their ex-client's domestic lawsuit against her husband. The majority, in Footnote #1, seems to agree with the court's decision, citing a "pre-Rules" case as their sole support for affirming the trial court's order allowing the intervention. With respect to the court's exercise of discretion to allow a party to intervene, the pertinent portion of N.C. Gen. Stat. Sec. 1A-1, Rule 24, North Carolina Rules of Civil Procedure, provides: "[T]he court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." It seems clear to me that the ruling of the trial court allowing this law firm to intervene in this domestic action for the purpose of enforcing a contingency fee contract had the potential to grossly prejudice both of the original parties. In my opinion, the trial court erred in entering the order allowing the intervention, and I vote to vacate the judgment entered pursuant thereto.

JOAN DUNLOW SPENCER v. WILLIAM RILEY SPENCER

No. 8310DC965

(Filed 4 September 1984)

1. Trial § 10.1— requiring counsel to define "jealousy"—no favoritism toward witness

The trial judge did not show undue favoritism toward the wife in a domestic relations case when he required the husband's counsel to define "jealousy" after counsel had repeatedly asked the wife whether she was jealous, the wife had already attempted to answer the question, and the wife had previously expressed her uncertainty as to what descriptions of her as "jealous" meant.

Spencer v. Spencer

2. Trial § 10.2— comment by court—no expression of opinion

The trial judge did not express an opinion as to the credibility of a witness when he commented, "The jury is not to consider that last comment by counsel. The witness is under oath and the court assumes her testimony is truthful."

3. Evidence § 14— physician-patient privilege—waiver by failure to object to testimony

Defendant waived his objection to a psychiatrist's testimony on the ground of the physician-patient privilege by failing to object to such testimony at the trial.

4. Appeal and Error § 42; Trial § 5.1— record on appeal—failure to include pre-trial order—sequestration of witnesses

Appellant failed properly to preserve his objection to a pretrial order concerning sequestration of witnesses where he failed to include the pretrial order in the record and there was no indication that he attempted to reconstruct any such order. Moreover, the decision to sequester lay within the trial court's discretion.

5. Divorce and Alimony § 16.8— finding of no willful failure to support—not res judicata on issue of depression of income

In a divorce action in which the "fault" issues were tried before a jury and a bench trial followed on issues of alimony and child support, a jury finding that defendant husband had not willfully failed to support plaintiff wife was not *res judicata* on the issue of defendant's depression of his income after the complaint was filed.

6. Divorce and Alimony § 16.5— female staying with defendant—competency on reasonableness of living expenses

In a proceeding to determine alimony and child support, cross-examination of defendant husband as to whether a certain female had been staying with him at his new apartment was properly permitted as bearing on the question of the reasonableness of defendant's living expenses. Furthermore, defendant failed to show that the trial court was influenced by such evidence.

7. Divorce and Alimony § 24.9— child support—finding as to private school tuition—supporting evidence

The evidence supported a finding by the trial court that private school tuition for the two minor children had been paid and could be paid in the future out of income from a dental laboratory partly owned by the children, and the trial court's failure to specify the dollar amount of tuition paid did not constitute reversible error.

8. Divorce and Alimony §§ 18.16, 27— alimony and child support—counsel fees—wife represented by two attorneys

The trial court did not abuse its discretion in its award of counsel fees to the wife in an action for alimony and child support because she had two attorneys present at the trial.

Spencer v. Spencer

9. Divorce and Alimony § 16.8— alimony and child support—insufficient findings

The trial court's findings were insufficient to support its award of alimony and child support to the wife where (1) the court made no findings as to the total value of either the husband's or the wife's estate or as to the liquidity or income-producing potential of each estate; (2) the court found that the husband had intentionally depressed his income but failed to find that his reduction in income was primarily motivated by a desire to avoid his reasonable support obligations; (3) the court found that the husband's lifestyle was extravagant but failed to find that the excessive expenditures were motivated by a disregard for the marital obligation to provide reasonable support; and (4) the court's finding regarding the husband's depression of his income was based upon an incorrect interpretation of the evidence.

10. Rules of Civil Procedure § 65— continuance of temporary order—necessity for specific findings

A temporary order in a divorce and alimony case enjoining the transfer of certain marital assets could not be continued by the court's adoption of those provisions of the temporary order not inconsistent with its final order. G.S. 1A-1, Rule 65(d).

APPEAL by defendant from *Creech, Judge*. Judgment entered 1 April 1983 in District Court, WAKE County. Heard in the Court of Appeals 6 June 1984.

Boyce, Mitchell, Burns & Smith, P.A., by G. Eugene Boyce, Carole S. Gailor, and Susan K. Burkhart, for defendant appellant.

Manning, Fulton & Skinner, by John B. McMillan and Robert S. Shields, Jr., for plaintiff appellee.

BECTON, Judge.

Defendant husband appeals from a final judgment in a contested divorce action. Principally because the trial court's findings relative to alimony are insufficient, we reverse and remand.

THE FACTS

Plaintiff Joan D. Spencer (wife) and defendant William R. Spencer (husband) married in 1966. Husband had recently begun a dental practice, while wife worked as a secretary. In 1968 and 1970, children were born of the marriage, and wife ceased work outside the home. Husband became increasingly involved with his practice and associated professional activities, as well as a succession of business ventures. As a result, tension developed in the marriage: wife in particular felt that husband spent too much

Spencer v. Spencer

time away from the family and paid too little attention to her. The couple underwent counselling, but this proved ineffective. The family continued to maintain a comfortable suburban life-style, however, with a large house, a beach cottage, club memberships, private school for the children, and more.

In 1981, after a period of increasing concern on wife's part about husband's lack of affection and about family finances, a dispute arose over a \$70,000 certificate of deposit. The certificate represented the proceeds of entireties property. Husband, who controlled family finances, originally had only his name put on it. Wife successfully insisted on having her name put on the certificate and then took and retained physical possession thereof, despite husband's demands for its negotiation.

Shortly thereafter, wife filed suit for divorce from bed and board, custody of the two children, temporary and permanent alimony and child support, equitable distribution, and counsel fees. Husband answered seeking divorce from bed and board, custody, and equitable distribution.

On 2 July 1982 the District Court entered an order pendente lite awarding wife temporary custody with visitation rights, temporary alimony and child support, and enjoining transfer of certain marital assets.

The cause came on for trial in two parts. The first was before a jury on the "fault" issues of whether husband had offered indignities to the person of wife and whether husband had willfully failed to provide wife necessary subsistence. Wife offered evidence of various indignities by husband, including aloofness, excessive criticism and regimentation of their marriage, denial of sexual relations, relationships with other women, threats of financial ruin, and general lack of caring. Husband offered contrary evidence of wife's excessive criticism, alcoholism, irrational jealousy and of his continuing love and concern for wife. The jury found that husband had in fact offered indignities so as to render wife's condition intolerable and her life burdensome, although it found that husband had *not* willfully failed to support her.

A bench trial followed on the issues of permanent alimony, child support and counsel fees. Both parties presented evidence regarding their living expenses, property, and income. The court

Spencer v. Spencer

awarded wife the family residence, custody of the children, \$2,800 per month in alimony and child support, and other relief. In addition, the trial court ordered husband to pay approximately \$30,000 in counsel fees. It also continued in effect all portions of the order pendente lite which did not conflict with the final order, which resulted in continuing the injunction against disposition of marital property. No equitable distribution of the marital property was ordered, nor was the issue set for further hearing.

Husband thereafter moved for relief from the injunctive and visitation provisions of the order pendente lite. The court ruled that it could not modify the order pendente lite since it had been adopted into the final order from which husband had taken a pending appeal.

Husband now appeals from the two trials and the subsequent order of the court. Further facts are set out as necessary in the opinion.

THE JURY TRIAL

I

As his principal assignment of error to the jury trial, husband contends that the trial court abused its discretion and showed undue favoritism during the course of his cross-examination of wife. Husband catalogues numerous acts and omissions of the trial judge, arguing that the numbers alone show favoritism, as well as pointing out several comments by the judge, all of which he contends improperly constituted an expression of an opinion on the merits.

We have reviewed the transcript carefully and find no prejudicial judicial conduct when we consider, as we must, all the facts and circumstances of the case. *See State v. Holden*, 280 N.C. 426, 185 S.E. 2d 889 (1972). The record shows that counsel for husband subjected wife to an exhaustive and aggressive examination. Not surprisingly, considering the issues at trial, this resulted in confused and emotional answers on her part. At no time, however, did the trial judge express any sympathy for wife's emotional state in the presence of the jury. Only once did the trial judge suggest a recess to allow wife to regain her composure. Considering the length of time wife was on the stand—260 pages of tran-

Spencer v. Spencer

script taken over three days—and the nature of the case, we do not find any error in the “score card” presented by husband.

[1] Nor do the specific errors alleged constitute reversible error. Husband stresses one exchange, during which the trial judge required his counsel to define “jealousy,” as indicative of the judge’s protectionism of the wife and irritation with the husband. However, the exchange came only after defense counsel had repeatedly asked wife whether she was jealous, wife had already attempted to answer the question, and had in fact substantially answered it, *and* after wife had previously expressed her uncertainty as to what others’ descriptions of her as “jealous” meant. We discern no favoritism.

[2] The other major exchange cited by husband occurred at the end of cross-examination when wife responded to defense counsel’s persistent questioning regarding whether or not she had faults by asking, “What kind of faults do you want?” Defense counsel replied, “I only wanted the truth, but—” and ended her questioning. In sustaining an objection and allowing a motion to strike counsel’s remark, the judge commented, “The jury is not to consider that last comment by counsel. The witness is under oath and the court assumes her testimony is truthful.” Defense counsel apologized; the trial judge then invited defense counsel to argue, in any appropriate way, any reasons to think the witness was not being truthful. Husband claims prejudicial error, arguing that the trial judge unfairly expressed an opinion as to the credibility of the witness. We disagree.

We do not approve of the trial judge’s remark, of course, but not every ill-advised comment constitutes prejudicial error. *State v. Holden*. In context the comment about assumed truthfulness appears to be nothing more than an indication of the trial court’s willingness to take defense counsel’s insinuation of perjury at face value. The statement is entirely consistent with the longstanding and sacred function of oaths as guarantees of truthfulness, subject to punishment by the laws of God and man. See *Shaw v. Moore*, 49 N.C. (4 Jones) 25 (1856). We think the jury understood it as such especially in light of the trial court’s explicit jury instruction later on, which emphasized to the jury their role as judges of the credibility of the witnesses. We note that the trial judge in no way “unequivocally endorsed” the credibility of the

Spencer v. Spencer

witness. See *In re Will of Holcomb*, 244 N.C. 391, 93 S.E. 2d 454 (1956).

The cases cited generally by husband do not compel a finding of prejudicial error. In *Worrell v. Hennis Credit Union*, 12 N.C. App. 275, 182 S.E. 2d 874 (1971), unlike here, the trial judge, repeatedly and on his own motion, sustained objections to and struck one side's evidence, in a persistently antagonistic manner. And in *In re Will of York*, 18 N.C. App. 425, 197 S.E. 2d 19, *cert. denied*, 283 N.C. 753, 198 S.E. 2d 729 (1973), the trial judge erred when he instructed the jury that they could change the answers to two issues already answered, after the jury had been in recess over the weekend, without cautioning them that he expressed no opinion theory. No such extenuating circumstances appear in this case. In closing our discussion of this assignment of error, we observe that the trial judge has broad discretionary power to control the trial of cases before a jury. *Miller v. Greenwood*, 218 N.C. 146, 10 S.E. 2d 708 (1940). Husband has failed to show any abuse of that discretion, and this assignment of error is therefore overruled.

II

[3] Shortly after the original filing of the Complaint, husband and wife attended marriage counselling together. Wife called the counsellor, a psychiatrist, to testify regarding his general evaluation of the marriage. Husband now contends that the testimony was privileged and that, therefore, the trial court erred in admitting it. See N.C. Gen. Stat. § 8-53 (Supp. 1983) (physician-patient privilege). However, he entirely failed to object on these grounds at trial. It is well-established that, except in certain circumstances not applicable here, failure to object to the admission of evidence at the time it is offered waives the objection. 1 H. Brandis, *North Carolina Evidence* § 27 (2d rev. ed. 1982); N.C. Gen. Stat. § 8C-1, Rule 103(a)(1) (Supp. 1983). A review of cases decided under G.S. § 8-53 (Supp. 1983) clearly indicates that the physician-patient privilege may be waived either expressly or impliedly. See *Neese v. Neese*, 1 N.C. App. 426, 161 S.E. 2d 841 (1968). Husband waived the privilege by failing to raise it at trial; this assignment of error is accordingly without merit.

Spencer v. Spencer

III

[4] Husband's final assignment of error to the jury trial concerns sequestration of one of wife's witnesses, who later testified as a rebuttal witness. He contends that he properly objected to the pretrial order which allowed the witness in the courtroom. However, no copy of the pretrial order appears in the record. The trial judge repeatedly stated his recollection that defendant had stipulated to the presence of the witness. On this record we hold that husband has failed to properly preserve his objection. As the appellant, he had the responsibility of seeing that the record was properly prepared. *Tucker v. General Telephone Co.*, 50 N.C. App. 112, 272 S.E. 2d 911 (1980). He failed to include the pretrial order in the record, nor is there any indication, by affidavit or stipulation, that he attempted to reconstruct any such order. We have cautioned litigants in the past to ensure that the decisions reached at pretrial conference are reduced to an agreed writing. *Amick v. Shipley*, 43 N.C. App. 507, 259 S.E. 2d 329 (1979).

Assuming, *arguendo*, that the trial judge's recollection was incorrect, the decision to sequester still lay within the trial court's discretion. *Stanback v. Stanback*, 31 N.C. App. 174, 229 S.E. 2d 693 (1976), *disc. rev. denied*, 291 N.C. 712, 232 S.E. 2d 205 (1977). Having reviewed the record, and in view of the brief and straight-forward testimony given by the witness, we do not find sufficient prejudice to lead us to conclude that the trial court abused that discretion. Therefore, we conclude that the jury portion of the proceedings was unaffected by prejudicial error.

THE BENCH TRIAL

I

[5] Husband contends that the jury's answer "No" to the issue of willful non-support constituted *res judicata*, and that, therefore, the trial court erred by considering depression of his income in determining the proper amount of alimony. We agree that once a fact has been decided by a jury, it is conclusive and may not be questioned by the parties as long as the judgment or decree remains unreversed. *Stansel v. McIntyre*, 237 N.C. 148, 74 S.E. 2d 345 (1953). However, as husband repeatedly and correctly pointed out at the jury trial, that trial, and therefore the resultant verdict, concerned only fault *before* the filing of the Complaint on 6

Spencer v. Spencer

January 1982. It did *not* relate to wife's *present* reasonable need for support *after* the filing of the complaint. That was the focus of the bench trial.

Of the trial court's factual findings on depression of income, only one relates to events *before* the filing of the Complaint on 6 January 1982. That involved the purchase of shares of CP&L stock on 31 December 1981, and also included a finding that husband's corporation still, *i.e.*, presently, owned the stock. Since the stock represented easily liquidated past corporate earnings which husband could readily have paid to himself on demand after 6 January 1982, it may reasonably be inferred that he depressed his actual salary payments after 6 January 1982 by keeping said earnings invested in the stock. We therefore conclude that this finding related to wife's present reasonable need for support after the filing of the Complaint, and that the trial court did not violate principles of *res judicata*.

II

[6] During cross-examination, husband was asked if another woman had spent the night with him at his new apartment. Wife's counsel argued that the questions would shed light on the reasonableness of husband's present living expenses, while husband's counsel argued that the question improperly touched on an alleged adulterous relationship. Husband now assigns error to the overruling of his objection. In a trial by the court sitting as finder of fact, we presume that the trial judge disregards incompetent evidence. 1 H. Brandis, *supra*, § 4a (2d rev. ed. 1982). On appeal, it must be shown that the trial judge was affirmatively influenced by the incompetent matter to justify a finding of prejudicial error. *Stanback v. Stanback*. The trial judge allowed questions as to regular visits, but excluded questions about single visits, explaining repeatedly that the only reason for allowing such examination at all was to determine the effect, if any, on husband's living expenses. We find this approach entirely logical and can discern no error. Husband has failed to show how, if at all, the questions influenced the trial court, and the assignment of error is accordingly overruled.

Spencer v. Spencer

III

[7] Husband objects to findings regarding payment of private school tuition for the two minor children out of income from a dental laboratory partnership. The trial court found that the lab, 50% owned by the children, received its work from husband's corporation. The trial court also found that the lab "provided *the* income for the minor children's education" at a private school (emphasis added), and later found that "*most* of the costs" of the private school tuition were paid out of the lab income. (Emphasis added.) Husband contends that these amounted to an erroneous finding that *all* the tuition, the total amount of which was not specified in the order, was paid out of lab income.

When findings are actually antagonistic, inconsistent, or contradictory such that the reviewing court cannot "safely and accurately decide the question," the judgment cannot be affirmed. *Lackey v. Hamlet City Bd. of Ed.*, 257 N.C. 78, 125 S.E. 2d 343 (1962). However, this Court must endeavor to reconcile apparently inconsistent findings and uphold the judgment when practicable. *Id.*; *Davis v. Ludlum*, 255 N.C. 663, 122 S.E. 2d 500 (1961). We can harmonize these apparently conflicting findings quite easily by avoiding husband's unduly literal stress on the word "the" in the first cited finding. The findings thus become reconcilable: they clearly reflect the trial court's conclusion that the major portion of the tuition costs had been paid, and could in the future be paid, out of the lab partnership's profits.

Turning to the basis of the findings, they are conclusive if supported by any competent evidence, even though the record may contain evidence *contra*. *Little v. Little*, 9 N.C. App. 361, 176 S.E. 2d 521 (1970). The trial court had before it evidence sufficient to support the findings on tuition. Husband's own Exhibit 17 at the bench trial showed total average tuition costs of some \$3,500 over the preceding three years, and partnership income tax returns showed total guaranteed payments to the minor children averaging over \$5,000 per year. Husband himself testified that the children's profits ranged between \$1,600 and \$2,700 per year, although he did not specify whether this was total or per child. This evidence adequately supports the finding that the partnership had paid most of the tuition costs.

Spencer v. Spencer

We also do not believe that the trial court's failure to specify the dollar amount of tuition paid constitutes reversible error. The critical question was not the actual amount of tuition but whether the partnership, over which husband exercised substantial control, could cover the tuition costs, thereby avoiding payment of any substantial portion of tuition costs out of husband's personal cash income, the likely source of any award of alimony. We therefore hold that the challenged findings are sufficiently detailed to enable us to determine that the trial court correctly applied the law to this issue. *See Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982) (discussing specificity requirements). The assignment of error is overruled.

IV

[8] Husband also assigns error to the award of counsel fees to wife, principally on the basis that she had two attorneys present at trial and that the award was therefore duplicative. Husband does not contest wife's entitlement to counsel fees, and the record amply supports the trial court's finding of such entitlement. Once it is determined that counsel fees are properly awarded in an alimony case, the *amount* of the award lies within the discretion of the trial judge and is reviewable only for an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980); *Stickel v. Stickel*, 58 N.C. App. 645, 294 S.E. 2d 321 (1982). The trial judge observed the conduct of counsel at trial and their various submissions. The hotly-contested trial and the allied proceedings took up some 12 volumes of transcript, 90 pages of printed record, and over 300 pages of exhibits.¹ Wife presented expert testimony on the representative costs of legal services for domestic cases in the area; the fees awarded fell within that range. On this record we cannot say that the court abused its discretion. We follow *Stickel*, in which we upheld an award of counsel fees to a litigant who had two attorneys at trial.

1. Considering the ninety (90) plus page briefs filed by each of the parties, including a thirty-six (36) page recitation of facts by the appellant, we feel compelled to caution the bar that litigants on appeal should not abuse the privilege now accorded by our appellate courts of not imposing length limitations on briefs. Many state courts, although allowing exceptions in some cases, impose strict length limitations on briefs. *See R. Leflar, Internal Operating Procedures of Appellate Courts* (1976). And of course, the federal courts are bound by Rule 28(g) of the Federal Rules of Appellate Procedure which, in relevant part, states: "Except by permission of the court . . . principal briefs shall not exceed 50 pages. . . ."

Spencer v. Spencer

There was evidence that approximately five hours were billed, and apparently awarded, for attorney time spent by wife's second law firm in familiarizing itself with the case after the first law firm had withdrawn. This appears to be *de minimis* with respect to the total award, however. And we also note that wife went without counsel for approximately a month in between. We therefore decline to overturn the award; husband has shown no abuse of discretion.

V

[9] Having found no error so far, we now turn to the trial court's findings with regard to the proper amount of alimony and child support to be awarded wife. We agree with husband that certain findings essential to a proper award are missing.

The policy and purpose of the various requirements for findings of fact in this type of case have been exhaustively elucidated by our Supreme Court and need not be repeated here. *See Quick; Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). The trial judge must at least make findings sufficiently specific to indicate proper consideration of each of the factors established by N.C. Gen. Stat. § 50-16.5(a) (1976) for a determination of an alimony award, and by N.C. Gen. Stat. § 50-13.4(c) (1976) for a determination of child support. *Quick; Coble*. The trial judge failed to do so in the present case. The existence of evidence in the record from which such findings *could* be made cannot remedy this failing. What the evidence does in fact show is for the trial court to determine, not this Court. *Quick*.

A

Despite evidence that the parties owned substantial property both individually and jointly and despite evidence that husband's corporation and other assets were heavily encumbered by debt, the trial court made no findings as to the total value of either husband's or wife's estate, their liquidity or income-producing potential. *Quick* unequivocally requires such findings. Wife's argument that the value of the estates was undisputed, and that therefore no findings were required, misses the point: the value of the estates, whether controverted or not, still bears on the essential questions of ability to pay and fairness to both parties. *See Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976).

Spencer v. Spencer

B

After finding that husband had intentionally depressed his income, the trial court concluded that he had the capacity to draw a larger salary and made its alimony award accordingly. In so doing it omitted the essential finding that husband's reduction in income was primarily motivated by a desire to avoid his reasonable support obligations. *Quick; Bowes v. Bowes*, 287 N.C. 163, 214 S.E. 2d 40 (1975). Absent such a finding, the trial court must determine alimony based on husband's income alone, not his earning capacity. *Id.* The record contains considerable evidence that husband structured his salary payments to reduce payment of income tax, rather than necessarily to avoid paying support. Therefore, the absence of the finding on intent constitutes error.

C

The trial court did find that husband's lifestyle was extravagant. Wife argues that this satisfies the requirement of findings on intent. We disagree. *Beall* requires findings that the excessive expenditures are motivated by a disregard for the marital obligation to provide reasonable support before the trial court may base an award on earning capacity. The finding that husband's lifestyle was extravagant is not sufficiently detailed to support wife's argument in any event. The evidence conflicted as to what constituted husband's necessary expenses, and the trial court made no specific findings as to what it considered extravagances. Again, there is evidence in the record from which we *could* find that certain expenditures were extravagant, but that determination properly rests with the trial court. *Quick*. More specific findings on this issue should be made upon remand.

D

The trial court made the following finding of fact regarding husband's depression of income:

Out of his \$5,000.00 per month salary, he is withholding for taxes the sum of \$1,960.00 when a more realistic figure would be approximately \$540.00 per month. The present rate of withholding will result in the defendant having withheld for the year 1983 almost twice as much as his accountant has determined the parties will have to pay in taxes for 1982 not

Spencer v. Spencer

even taking into account alimony deductions which will be available to defendant in 1983 and future years.

The accountant's testimony, on which this entire finding is based, clearly shows that the \$540 figure would be appropriate only if husband filed a separate return and deducted \$29,000 in alimony payments. The finding regarding the ratio of 1982 taxes to 1983 taxes is also not supported by competent evidence. Accordingly, this finding represents an incorrect interpretation of the evidence and must be stricken.

E

Wife contends that a separate finding establishes that husband is "reasonably able to pay" \$2,000 per month in alimony, and that husband has not brought his exception thereto forward and so it is now conclusively established. *See* 4A N.C. Gen. Stat. App. I (2A), N.C. R. App. P. 10(c) (Supp. 1983). The excepted finding precedes another excepted but unargued finding, which essentially recites that the \$2,000 figure was reached with due regard to the factors set out in G.S. § 50-16.5(a) (1976). Since we have already held that the trial court failed to consider all of the statutory factors, and since *Quick* imposes certain standards of specificity on findings as to those factors, we reject wife's argument. Although husband could have better preserved his exceptions, he did properly bring forward his challenges to the trial court's consideration of the statutory factors. Therefore, we hold that these findings do not affect the result that the findings as a whole are insufficient.

VI

[10] As part of its judgment the trial court adopted those provisions of the temporary order not inconsistent with the final order. This effectively continued an injunction against the disposition of certain marital assets. Husband asserts that this constituted error, since a final order in a divorce proceeding renders any order pendente lite void. *See Yow v. Yow*, 243 N.C. 79, 89 S.E. 2d 867 (1955).

We agree, but for a different reason. The injunctive portion of the order is governed by N.C. Gen. Stat. § 1A-1, Rule 65(d) (1983), which provides: "Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms;

Spencer v. Spencer

[and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained. . . ." In *Gibson v. Cline*, 28 N.C. App. 657, 222 S.E. 2d 478 (1976), we ruled that a temporary restraining order could not be continued by simply reciting as reasons that the court had read the order and complaint and heard argument. Mere adoption by reference, as in the present case, clearly does not suffice. Compare under similar federal rule *H. K. Porter Co., Inc. v. Nat'l Friction Products Corp.*, 568 F. 2d 24 (7th Cir. 1978) (incorporation of earlier agreement insufficient); *Meltzer v. Bd. of Public Instruction of Orange County*, 480 F. 2d 552 (5th Cir. 1973) (order requiring continued compliance with earlier order insufficient). Therefore this portion of the final order is erroneous. We note that both parties requested an equitable distribution, but the final order neither attempts such a distribution nor sets it for later disposition. On remand, then, the trial court must also resolve this issue.

RESULT

The disposition of the issues discussed above renders husband's remaining assignments of error moot. The appropriate relief on remand now becomes the question. Following the result in *Quick* appears unduly harsh and wasteful: in *Quick* the findings were "woefully inadequate" in many respects, and the Supreme Court accordingly vacated the order *in toto*. In the present case, however, although there are deficiencies in the final order, it does represent a conscientious effort to reduce to final judgment the results of a lengthy trial and a voluminous record. It would be pointless to go back to the beginning. Therefore, we remand for consideration of the errors pointed out above, including further hearing to the extent necessary. See *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 258 S.E. 2d 379 (1979), *disc. rev. denied*, 299 N.C. 120, 261 S.E. 2d 923 (1980).

As to the jury trial,

No error.

As to the bench trial,

Yow v. Alexander Co. Dept. of Soc. Serv.

Reversed and remanded.

Judges HILL and BRASWELL concur.

SHARON O. YOW v. ALEXANDER COUNTY DEPARTMENT OF SOCIAL SERVICES AND NAN CAMPBELL AND ALEXANDER COUNTY

No. 8322SC1045

(Filed 4 September 1984)

Public Officers § 12— State employee—appointment as “trainee”—no entitlement to due process in dismissal

An employee subject to the State Personnel Act who held a “trainee” appointment as defined by the N. C. Administrative Code did not have tenure, either under State law or an employee handbook; therefore, the employee did not have a property interest in her continued employment which entitled her to the protection of the Due Process Clause of the Fourteenth Amendment.

APPEAL by plaintiff from *Lupton, Judge*. Judgment entered 12 May 1983 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 20 August 1984.

Plaintiff appeals from an adverse judgment in her suit wherein she had been wrongfully discharged from employment.

The pertinent facts are as follows:

In November 1980, plaintiff, Sharon Yow, after having been selected for employment under the State's competitive system of selection, began working as a Social Worker Trainee at the Alexander County Department of Social Services.

On 5 October 1981, defendant, Nan Campbell, Director of the Alexander County Department of Social Services, had a conference with plaintiff. There, Ms. Campbell verbally notified plaintiff that her employment was going to be terminated. In addition, Ms. Campbell provided plaintiff with a letter, signed by Ms. Campbell, which stated that plaintiff's services as a social worker trainee had not met the expectations of an employee in order to be granted permanent status under the State Personnel System. This letter outlined three reasons for this conclusion: inadequacy in understanding overall job responsibilities, inadequacy in inter-

Yow v. Alexander Co. Dept. of Soc. Serv.

viewing skills and inadequacy in serving the client in a manner which contributes to his or her self-respect.

Plaintiff did not believe that her termination had been made in accordance with the guidelines set out in the "Alexander County Department of Social Services Employee Handbook." She therefore requested a hearing before the Board of Directors of the Alexander County Department of Social Services. Her request was granted and plaintiff made an appearance before the Board. Prior to the hearing, plaintiff had requested but had not been given further information as to the reasons for her dismissal. At the hearing, plaintiff was allowed to present witnesses and to make a statement on her own behalf. She was not allowed to ask any questions of Ms. Campbell nor was she given any further indication as to the reasons for her dismissal.

A week after the hearing, plaintiff's attorney was notified by a letter from defendants' attorney that the Board would not take any action with regard to the termination of plaintiff's employment. This letter also detailed ten problems which were considered as reasons for plaintiff's termination.

On 20 January 1982 plaintiff filed suit seeking judgment against the defendants on the grounds that she was discharged in violation of her contract and without being accorded due process of law. At trial, upon completion of the plaintiff's evidence, the defendants moved for a directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure.

Homesley, Jones, Gaines and Fields, by Edmund L. Gaines, for plaintiff appellant.

Patrick, Harper and Dixon, by Charles D. Dixon and Mary Gwyn Harper; and Richard L. Gwaltney for defendants appellees Alexander County Department of Social Services and Nan Campbell.

Patrick, Harper and Dixon, by Charles D. Dixon and Mary Gwyn Harper; and Jerry A. Campbell, for additional defendant appellee Alexander County.

VAUGHN, Chief Judge.

The primary issue on this appeal is whether an employee subject to the State Personnel Act who holds a "trainee" appoint-

Yow v. Alexander Co. Dept. of Soc. Serv.

ment as defined by the North Carolina Administrative Code has a property interest in her continued employment and is thus to be accorded the protection of the Due Process Clause of the Fourteenth Amendment. We hold that she does not.

Plaintiff contends that her complaint states a claim for relief under 42 U.S.C. § 1983. She argues that her loss of employment constituted deprivation of a constitutionally protected interest. Whether an employee has a property interest under the Fourteenth Amendment is a question decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed. 2d 684 (1976). Further, the United States Supreme Court has held that, in the context of state employment cases, without some legitimate claim to job tenure the employee can be summarily dismissed without hearing or cause so long as the dismissal is not for a constitutionally impermissible reason. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972). See also *Bean v. Taylor*, 408 F. Supp. 614 (M.D.N.C.), *aff'd*, 534 F. 2d 328 (4th Cir. 1976). No such reason is alleged in the instant case. Thus, in order to have made out a procedural due process claim, plaintiff must have shown (1) that she had actual formal tenure under the state personnel laws or rules promulgated pursuant to Chapter 126, or (2) that the Alexander County Department of Social Services Employee Handbook confers a right to tenure binding on the State. See *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *Dyer v. Bradshaw*, 54 N.C. App. 136, 282 S.E. 2d 548 (1981).

Chapter 126 of the General Statutes establishes and provides for the administration of the State Personnel System. The purpose of the State Personnel Act is to "establish for the government of the State a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as evolved in government and industry." G.S. 126-1. The Act establishes a State Personnel Commission which has the responsibility of establishing policies and rules governing, among others, (1) a position classification plan, (2) a compensation plan, (3) reasonable qualifications for each position, (4) the appointment, promotion, transfer, demotion, suspension and separation of employees, and (5) the evaluation of employee performance. G.S. 126-4.

Yow v. Alexander Co. Dept. of Soc. Serv.

G.S. 126-5 and G.S. 108A-14(2) provides that the provisions of Chapter 126 shall apply to employees of local social departments and that these employees shall be appointed to their positions by the director of social services for the county in which they are going to work in accordance with the merit system rules of the State Personnel Commission. Those rules which, at the time this action arose, pertained to local government employees subject to the State Personnel Act were set forth in Title 1, Chapter 8, Subchapter 8I of the North Carolina Administrative Code (recodified as 25 N.C. Admin. Code II, effective 1 March 1984). This Court is empowered to take judicial notice of administrative rules effective under the Administrative Procedure Act, Chapter 150A, including those of the State Personnel System. G.S. 150A-64; G.S. 126-43. Since both Mrs. Yow's appointment (trainee) and position (Social Worker Trainee) were made pursuant to Chapter 126 of the General Statutes and the North Carolina Administrative Code, the following are the pertinent rules governing appointment and termination of a social worker trainee.

The North Carolina Administrative Code sets forth the types of appointments for local government employees:

(a) Probationary Appointment

(b) Trainee Appointment

. . . .

(i) Permanent Appointment

1 N.C. Admin. Code 8I .0700(a)-(i).

The Code defines probationary, trainee and permanent appointments as follows:

(a) Probationary Appointment. A probationary appointment is the initial appointment of an eligible made to a permanent position. . . .

(b) Trainee Appointment. A trainee appointment may be made to a permanent position in any class for which the specification includes special provisions for a trainee progression leading to regular appointment. An individual may not be appointed as a trainee if he/she possesses the acceptable training and experience for the class.

Yow v. Alexander Co. Dept. of Soc. Serv.

(1)

The specification for each class in which trainee appointment is to be authorized will define the minimum qualifications for . . . a regular probationary appointment. . . . An employee may not remain on a trainee appointment beyond the time when he/she meets the education and experience requirements for the class. After the employee has successfully completed all education and experience requirements, he/she shall be given probationary or permanent status in the position without further competitive examination or shall be separated. If the period of trainee appointment equals or exceeds the maximum probationary period, he/she must be given permanent status immediately or be separated.

. . . .

(i) Permanent Appointment

(1) A permanent appointment is an appointment to a permanently established position when the incumbent is expected to be retained in the position on a permanent basis. Permanent appointments follow the satisfactory completion of a probationary and/or trainee appointment.

. . .

Id.

For positions subject to competitive service, an employee does not achieve permanent status until the following requirements have been satisfied: "(1) The employee has been certified and approved for a probationary, trial or trainee appointment; (2) The employee has satisfactorily completed the probationary period; and (3) The employee with a trainee appointment has completed all training and experience required for elimination of trainee status." 1 N.C. Admin. Code 8I .0803(1)-(3).

Plaintiff served as a trainee until her termination in October 1981. The distinctions between permanent appointments on the one hand and probationary and trainee appointments on the other are important because the rights afforded the two groups upon separation differ.

Employees who have acquired permanent status cannot be terminated except for cause, 1 N.C. Admin. Code 8I .0904(b), and

Yow v. Alexander Co. Dept. of Soc. Serv.

have the right to appeal such termination. 1 N.C. Admin. Code 8I .1305(a). During the probationary period, however, an employee may be terminated upon 15 days written notice when it is determined that she is unsuitable for the position, is not going to be able to achieve a satisfactory level of performance, or for other cause. 1 N.C. Admin. Code 8I .0802(a). These other causes include causes relating to performance of duties and personal conduct detrimental to the agency. 1 N.C. Admin. Code 8I .0802(c). No right of hearing or appeal is granted. *Id.*

The rules governing the dismissal of an employee holding a trainee appointment are, admittedly, not clearly articulated in the Code. Logic, however, would dictate that a trainee employee, one whose qualifications are not sufficient to raise her to probationary status, could only have the same or fewer, not more, rights than a probationary employee. The Code describes the probationary period as "an essential extension of the selection process [which] provides the time for effective adjustment of the new employee or elimination of those whose performance will not meet acceptable standards." 1 N.C. Admin. Code 8I .0801. During this period an employee may be dismissed for cause or otherwise. *Id.*, N.C. Admin. Code 8I .0802(a), (c).

The probationary period is a trial period for those who already possess sufficient qualifications for their position. It permits the State an opportunity to observe an employee's work before it confers something as valuable as tenure upon the employee. A similar but possibly longer trial period for those who do not possess sufficient qualifications for their position seems entirely reasonable and in accord with the intent of the drafters of the Code. See 1 N.C. Admin. Code 8I .0701(b)(1) (recognizing that the trainee period may extend beyond the maximum time normally allowed for the probationary period). Indeed, in the subchapter dealing with appointments of State, rather than local, government employees, the description of the trainee appointment includes the recitation that it too, like the probationary appointment, is "also an extension of the selection process . . . [permitting] the elimination of those whose performance will not meet acceptable standards." 1 N.C. Admin. Code 8C .0403(b).

For reasons stated above, we hold that State law does not confer tenure and thereby a protectable property interest upon an employee with a trainee appointment.

Yow v. Alexander Co. Dept. of Soc. Serv.

The language found in the Employee Handbook is quite similar to that found in the Administrative Code. Under the heading "PROBATIONARY PERIOD" the handbook provides:

When the employee's performance meets the required standard of work after he has served at least three months in the position, he shall be given permanent status unless he has a trainee appointment. If he does not achieve this level of performance within nine months after initial appointment, he shall be separated from service unless he is in trainee status; an employee with a trainee appointment is not expected to reach a satisfactory performance standard for the regular class until he has completed his training period. . . .

The employee's service in the class may be terminated during his probationary period when it is determined that he is unsuitable for the position, is not going to be able to achieve a satisfactory level of performance, or for other cause. At any time during a probationary period an employee may be separated from service for causes relating to performance of duties or for personal conduct detrimental to the agency without right of appeal or hearing.

If an employee is not given permanent status at the end of a nine months probationary period or at the end of the trainee period, his service must be terminated.

Alexander County Department of Social Services Employee Handbook, 34-35.

In essence, this statement provides that a trainee will not be eligible for permanent status until she completes a training period which may extend beyond the regular nine month probationary period. The trainee is subject to summary termination at the end of the training period if not given permanent status; this section provides no right of hearing or appeal upon separation.

Plaintiff asserts that she had a right to the warnings set forth on pages 48-51 of the handbook. This section of the handbook is entitled "DISCIPLINARY ACTION, SUSPENSION AND DISMISSAL" and provides for a multi-step process involving oral and written warnings prior to dismissal of an employee.

Plaintiff was not entitled to these warnings for two reasons. First, they are intended to apply only to disciplinary dismissals

State v. Beam

for (1) causes relating to performance of duties, or (2) causes relating to personal conduct detrimental to public service, not to dismissals based on unsuitability for a position or inability to achieve a satisfactory level of performance. This is demonstrated by the use of "PERFORMANCE OF DUTIES" and "PERSONAL CONDUCT" as the primary subheadings with the appropriate disciplinary sequence outlined under each of these subheadings.

Second, the warning sequence is discretionary. "An employee . . . may be warned, reprimanded, suspended or dismissed. . . . The degree and kind of action to be taken will be based upon the [supervisor's] sound and considered judgment. . . ." Employee Handbook at 48. *See Sumler v. City of Winston-Salem*, 448 F. Supp. 519, 529 (M.D.N.C. 1978) (holding that the word "may" implies discretionary action).

Finally, plaintiff raises two additional issues on this appeal: (1) whether certain representations made by Ms. Campbell gave rise to an implied contract of tenure binding on the State, and (2) whether defendants violated plaintiff's liberty interest by placing her letter of termination in her employment file. We have carefully considered plaintiff's arguments on both issues and find them to be without merit.

Affirmed.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. FRANK L. BEAM, JR.

No. 8327SC1103

(Filed 4 September 1984)

1. Criminal Law § 21.1— absence of preliminary hearing—no constitutional or statutory violation

Neither the Constitution of the United States nor the Constitution of North Carolina requires a probable cause hearing as a necessary step in the prosecution of a defendant, and G.S. 15A-606(a) requires a probable cause hearing only in those situations in which no indictment has been returned by a grand jury.

State v. Beam

2. Indictment and Warrant § 4— indictment based on hearsay evidence

An indictment will not be quashed on the ground that testimony before the grand jury given by a qualified witness may have been hearsay and incompetent. Further, a defendant is not entitled to examine members of the grand jury and witnesses appearing before the grand jury to support his contention that the finding of a true bill was based solely on incompetent evidence.

3. Constitutional Law § 30— statements of witnesses not discoverable

A defendant in a criminal case is not entitled to the pretrial discovery of copies of statements of the State's witnesses.

4. Constitutional Law § 30— denial of motion for discovery of exculpatory evidence

The trial court properly denied defendant's pretrial motion for discovery of exculpatory evidence allegedly possessed by the State where defendant contended that the State withheld evidence by certain individuals who did not testify at the trial, and sworn statements of both individuals filed in support of a motion for appropriate relief could not be considered exculpatory.

5. Criminal Law § 73.2— statement not within hearsay rule

Testimony by deceased's mother that a doctor had told her that her son had an enlarged heart was admissible since it was not offered to prove that the deceased had heart problems but was offered to prove that defendant had knowledge of the facts declared in the statement.

6. Criminal Law § 162.4— unresponsive portion of answer—necessity for motion to strike

Failure to move to strike the unresponsive part of an answer, even though the answer is objected to, results in a waiver of the objection.

7. Criminal Law § 34.8— other crimes—competency to show common plan and motive

In a prosecution for the murder of a rest home patient who died of heart failure after defendant, the rest home owner, allegedly assaulted him, testimony concerning assaults by defendant on other rest home patients who disobeyed defendant's orders or violated rules of the rest home was competent to show a common scheme and pattern of defendant and to show defendant's motive for assaulting deceased for having disobeyed an order of defendant.

Judge BECTON concurs in the result.

APPEAL by defendant from *Grist, Judge*. Judgment entered 3 May 1983 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 2 May 1984.

Defendant was tried on an indictment, proper in form, charging him with murder in the second degree of Emmett Kenneth Hawkins. Upon a jury verdict finding defendant guilty of involun-

State v. Beam

tary manslaughter the trial judge imposed the presumptive term of three years. From the verdict and judgment imposed, defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General J. Michael Carpenter, for the State.

Horn, West, Horn and Griffin, P.A., by C. A. Horn, for defendant appellant.

JOHNSON, Judge.

The State's evidence tended to show the following: Emmett Kenneth Hawkins was born 27 August 1956. On 7 March 1975, he was admitted as a patient to the Western Carolina Center for the mentally retarded in Morganton, North Carolina. Upon his admission Emmett underwent a physical examination and a series of tests conducted by Dr. Agnes Milan. As a result of the physical examination and various tests conducted, Dr. Milan diagnosed Emmett as having a heart murmur and an enlarged heart. Dr. Milan advised Emmett's mother, Jane Katherine Hawkins, of Emmett's heart diseases.

On 28 December 1976, Emmett became a patient at the F. L. Beam Rest Home of Fallston, North Carolina. The rest home was owned and operated by defendant, who at times assigned various patients to do chores around the rest home. On several occasions defendant assaulted patients who disobeyed him or violated the policies of the rest home. On 15 August 1981, after Emmett had returned from a trip into the town of Fallston, defendant charged into Emmett's room and yelled, "What in the hell have you been doing? I told you to go out this morning and help dig a grave." When Emmett responded, "I'm not digging no (sic) more graves. My mother said I was a boarder here and I wasn't supposed to work," defendant commenced beating Emmett by slapping him and striking him in the chest. Emmett died as a result of heart failure caused by the stress defendant's assault placed upon his diseased heart. Prior to this assault upon Emmett, defendant had been advised of Emmett's heart diseases.

Defendant offered evidence which tended to show the following. Dr. Richard Maybin, a general practitioner of medicine, testified that he has examined patients of F. L. Beam Rest Home.

State v. Beam

Emmett was a patient of his from 1977 through February 1981, and the only diagnosis Dr. Maybin made of Emmett is that he suffered from mental retardation. Dr. Maybin further testified that he was never aware that Emmett suffered from any heart disease. Defendant testified that in addition to owning and operating the F. L. Beam Rest Home, he was also in the grave digging business, but that he never assigned Emmett to dig a grave and that he never struck Emmett or knew that Emmett suffered from any heart disease. Defendant further testified that Donna Avery is the only rest home patient he ever struck.

Additional facts shall be set forth in the opinion as necessary for the discussion of the issues.

At the outset, we note that defendant's assignments of error IV, VIII, XI, XII, XIII, XIV, XVI, XVIII, XIX, XX and XXI are abandoned in that appellant fails to discuss or cite authority in his brief concerning these assignments of error. Rule 28(b)(5) of the Rules of Appellate Procedure.

[1] By his first assignment of error defendant contends that failure to provide him with a probable cause hearing constituted a denial of his constitutional right to due process and violated the provisions of G.S. 15A-606(a). G.S. 15A-606(a) provides in pertinent part that "The judge must schedule a probable cause hearing unless the defendant waives in writing his right to such hearing."

The identical issues raised by defendant's first assignment were addressed in *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978). The *Lester* Court held (1) that neither the Constitution of the United States nor the Constitution of North Carolina requires a probable cause hearing as a necessary step in the prosecution of a defendant and (2) that G.S. 15A-606(a) requires a probable cause hearing *only* in those situations in which no indictment has been returned by a grand jury. *Id.* at 223-224, 240 S.E. 2d at 396 (emphasis added). In the case *sub judice*, the grand jury returned an indictment against defendant, thereby negating the requirement of a probable cause hearing under G.S. 15A-606(a). Accordingly, this assignment of error is without merit.

Defendant contends the trial court erred in the denial of his motion to quash the bill of indictment and the court's granting of

State v. Beam

the State's motion to quash subpoenas issued by defendant for the grand jury foreman and a witness who appeared before the grand jury. We disagree.

Defendant argues that the indictment was invalid because the sole witness who appeared before and was examined by the grand jury was Wayne Pegram, an SBI agent, and that all Agent Pegram knew about the case was hearsay. Defendant does not contend that Agent Pegram was not a competent witness to appear before the grand jury, but simply that his testimony was hearsay, a fact defendant proposed to establish through the grand jury foreman and Agent Pegram for whom defendant issued subpoenas.

[2] It is well established that an indictment will not be quashed on the ground that testimony before the grand jury given by a qualified witness may have been hearsay and incompetent. *State v. Cade*, 268 N.C. 438, 150 S.E. 2d 756 (1966); *State v. Hartsell*, 272 N.C. 710, 158 S.E. 2d 785 (1968). Further, a defendant is not entitled to examine members of the grand jury and witnesses appearing before the grand jury to support his contention that the finding of a true bill was based solely on incompetent evidence. *State v. Walker*, 251 N.C. 465, 477-478, 112 S.E. 2d 61, 70, *cert. denied*, 364 U.S. 832, 81 S.Ct. 45, 5 L.Ed. 2d 58 (1959). This assignment is overruled.

Defendant contends the trial court erred in the denial of defendant's pretrial motions to require the State to produce statements of witnesses for the State and to disclose exculpatory statements.

On 17 January 1983, defendant filed a pretrial motion for discovery pursuant to G.S. 15A-903 in which he sought among other things "(1) Any and all statements made by any witness to any agent of the State of North Carolina during its investigation. . . ." On 7 April 1983, defendant filed a second pretrial motion for discovery of:

"all information and evidence in the possession of the State or prosecution that may be materially favorable to the accused. . . ., to wit:

(a) Copies of any and all statements allegedly made by the defendant, whether oral, written, taped, recorded or in

State v. Beam

whatever form that the prosecution intends to introduce into evidence or to rely upon in the trial of said case.

(b) The names and addresses of all persons interviewed and a copy of the statement allegedly made by such person and whether such statement is oral, written, taped, recorded or otherwise reduced to writing by summary or otherwise.

(c) The total and complete list of all persons interviewed in the entire investigation and the name of the person or persons conducting such interview, together with a copy and correct account of the interview. If more than one interview has been made as to any person, then a copy and result of each interview should be produced.

(d) Any and all tape or electronic recordings, written statements or summaries made thereof by any office or employee with reference to all persons interviewed, whether they are to be called as witnesses for the state or not, and any other attorney with whom the state may have privy of investigative reports or interviews in any form fully stated within this motion whether they are to be called as witnesses for the state or not.

(e) A complete and detailed list of the criminal record of all state's witnesses, including any and all charges which may now be pending against them and which has not yet been officially disposed of by plea, trial or otherwise.

(f) Any and all written reports, documents, or any physical evidence that is in the possession of the state or the prosecution relative to this case or the investigation thereof.

(g) The total and complete investigative files of the State Bureau of Investigation, Department of Human Resources, and other agency or bureau of the state who may have taken part in any phase of said investigation; together with all correspondence and communications concerning the same.

(h) The names and addresses of all agents of the State Bureau of Investigation, Department of Human Resources, Cleveland County Department of Social Services, sheriff's office or district attorney's office who may have participated in said investigation.

State v. Beam

(i) Whether or not any person interviewed in reference to said case or the investigation thereof has in any way or manner directly or indirectly been subjected to any coercion, duress, threats, intimidation, punishment, unequal treatment or discrimination and whether any of such persons have been promised immunity from prosecution, leniency or any form of reward, inducement or offer of help of assistance has been held out, offered or made to him.

7. There may be other items and matters of evidence, information, and data in existence that are not enumerated aforesaid and of which movant is unaware, due to the secrecy surrounding the investigation and the lack of a preliminary hearing but in any event movant now requests and demands that he be afforded with any and all evidence and information, whether specifically delineated and listed herein or not, that may be materially favorable to the movant”

In response to defendant's motions, the State filed a motion for a protective order pursuant to G.S. 15A-908 requesting that defendant's motions be denied on the grounds that (1) the State was not required to furnish defendant with statements of the State's witnesses; (2) defendant's pretrial motion of 7 April 1983 amounts to no more than a general request for all favorable material evidence and (3) the State was not in possession of any evidence which was both material and exculpatory or favorable to defendant. On 18 April 1983, after considering the above motions and after hearing arguments of counsel for the defendant and State, the court denied defendant's motions.

[3] It is well settled that a defendant in a criminal case is not entitled to the pretrial discovery of a copy of statements of the State's witnesses. *State v. Moore*, 301 N.C. 262, 268, 271 S.E. 2d 242, 246 (1980); *State v. Abernathy*, 295 N.C. 147, 156, 244 S.E. 2d 373, 380 (1978). Accordingly, defendant's pretrial motion of 17 January 1983 was properly denied.

[4] In support of his 7 April motion defendant relies upon *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). The *Brady* Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” *Id.* at 87, 10 L.Ed. 2d at 218, 83 S.Ct. at 1196-97.

State v. Beam

In *State v. Hardy*, 293 N.C. 105, 127, 235 S.E. 2d 828, 841 (1977), the Court held that for the *Brady* standard to apply, the defendant is required to make a *specific request at trial* for disclosure of the evidence (emphasis added). The Court further stated that once defendant has made a specific request at trial, the trial court is required to order an in camera inspection and make appropriate findings of fact. If the judge, after the in camera examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review. *Id.* at 128, 235 S.E. 2d at 842. A request for "all favorable and material evidence" does not alert the prosecution to the materials requested. Consequently, such a request amounts to "no request." *Id.* at 127, 235 S.E. 2d at 842.

Defendant's motion of 7 April 1983, is no more than a general request for a fishing expedition to have the State give defendant all that the State has learned about the case, about its witnesses and to make a complete and detailed accounting to the defense of all state agencies' investigatory work on the case. As a result, the trial court did not conduct an in camera examination and did not include any alleged exculpatory evidence in the record. Ordinarily, this would preclude this Court from being able to conduct any review of any alleged exculpatory evidence which defendant asserts that the State possessed. However, defendant presents the alleged exculpatory evidence to this Court in a motion for appropriate relief he filed with this Court 16 April 1984, pursuant to G.S. 15A-1418. In his motion for appropriate relief, defendant states that he conducted post-trial interviews with Mary Evelyn Green, Martha Morris and William White, none of whom were witnesses at the trial of the case. Defendant attached sworn statements of these individuals which defendant contends constitute the exculpatory evidence withheld by the State and which would have had a direct and material bearing upon the outcome of the case.

We fail to see how any of these statements could constitute exculpatory evidence or could have influenced the jury to have arrived at a different verdict. A summary of Green's post-trial statement is that she was interviewed by a SBI agent before defendant's trial and that she told the agent that the defendant slapped her on the jaw twice. A summary of White's statement is that on 15 August 1981, he was in the TV room and that he heard

State v. Beam

nothing. Further, that he never heard anyone say that defendant beat Emmett. A summary of Morris' statement is that on 15 August 1981, defendant struck Emmett in the chest and that Emmett, thereafter, complained of chest pain and fell to the floor. This evidence fails to support defendant's contention that the State was in possession of any exculpatory evidence relating to this case. Accordingly, the trial court properly denied defendant's motion of 7 April. Also, defendant's motion for appropriate relief is hereby denied.

[5] Defendant next contends that the court erred in allowing Jane Hawkins to testify that she told defendant that a doctor at the Western Carolina Center told her that her son had an enlarged heart. This testimony was not offered to prove that the deceased had heart problems, but was offered solely to prove that defendant had knowledge of the facts declared in the statement. Accordingly, the testimony was admissible. *See State v. Dailey*, 33 N.C. App. 551, 235 S.E. 2d 876 (1976), *cert. denied*, 293 N.C. 254, 237 S.E. 2d 258 (1977).

In a related assignment, defendant contends the court erred in allowing the mother of the deceased, Jane Katherine Hawkins, to testify that the doctors felt that her son, the deceased, was born with a heart murmur and that she told the defendant what the doctors said about her son's heart condition. We disagree.

[6] In response to a question concerning difficulties she experienced with her pregnancy and birth of her son, Jane Hawkins stated: "I had a rough pregnancy with him. He was born three weeks premature and when he was born, *they felt that he started out having heart murmur.*" (Emphasis added.) Defendant's objection to the answer was overruled. Defendant now complains that the emphasized portion of the answer is hearsay and therefore inadmissible. Although defendant objected, he made no motion to strike. Failure to move to strike the unresponsive part of an answer, even though the answer is objected to, results in a waiver of the objection. *State v. Chatman*, 308 N.C. 169, 178, 301 S.E. 2d 71, 77 (1983). These assignments are overruled.

[7] Defendant contends the court erred in allowing evidence, through eyewitness thereto, of previous assaults committed by the defendant upon other patients of the F. L. Beam Rest Home. At trial, the State contended that it was defendant's custom and

State v. Beam

practice to beat those patients who disobeyed his orders or breached the rules of the rest home as a means of "disciplining" them; that prior to 15 August 1981, defendant had assaulted other patients at the rest home and that on 15 August 1981, defendant, in keeping with his practice, beat the deceased because the deceased had apparently failed to help dig a grave as he had been so ordered by the defendant. The State's evidence tended to show that on 15 August 1981, defendant, after charging into the deceased's room and yelling, "What in the hell have you been doing? I told you to go out this morning and dig a grave," commenced beating the deceased when the deceased told him that he was not going to dig any more graves.

Over defendant's objection the court allowed the following witnesses to testify to assaults they had observed defendant commit on other rest home patients: Homer Chatham testified that he observed defendant beat Ricky Webb, Ruth Ewings and Betty Parlier, and that defendant told him that he beat those patients who failed to listen to him in order to make them obey and to show them that he was the "boss." Dorothy Baynard testified that she observed defendant beat Mary Evelyn Green about the face with his hand and fist. Mary Lee Finner testified that she observed defendant beat Donna Avery, Catherine Hanna and William White. Hazel Mae Hunter testified that she observed defendant beat Ricky Webb, Donna Avery and a patient named Paul. Christina Jones testified that she observed defendant beat Donna Avery. None of these alleged assault victims were witnesses at the trial.

This evidence clearly shows a common scheme and pattern of the defendant to beat patients in order to make them obey him and to show them that he was in charge. It also shows defendant's motive for assaulting the deceased for having disobeyed defendant's orders to help dig a grave. Accordingly, this evidence was properly admitted. See *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

We have carefully examined defendant's remaining assignments of error regarding the court's evidentiary rulings and find them to be without merit.

Defendant has received a trial free of prejudicial error.

State v. Wheeler

No error.

Judge WELLS concurs.

Judge BECTON concurs in the result.

STATE OF NORTH CAROLINA v. JIMMY DEAN WHEELER AND SHERMAN
VAN HAMMETT

No. 8324SC943

(Filed 4 September 1984)

1. Robbery § 6— robbery of husband and wife—two separate crimes

Defendants could properly be convicted of two counts of armed robbery where the evidence showed that they held a husband and wife at gunpoint and took personal property belonging to each. There was no merit to defendants' contention that each victim had a special property interest in the item taken from the other as a result of their marital relationship and joint possession so that only one crime of robbery was committed.

2. Burglary and Unlawful Breakings § 1.2— constructive breaking by trickery

The State's evidence of constructive breaking was sufficient to support defendants' convictions of felonious breaking or entering where it tended to show that defendants gained entry into the victims' home by telling the victims that they wanted to use the telephone to call a hospital when their motive in entering the home was robbery.

3. Criminal Law § 138— aggravating factors—detering others—depreciating seriousness of crime

The trial court erred in finding as aggravating factors in sentencing that the sentence pronounced was necessary to deter others from the commission of the same offenses and that a lesser sentence would unduly depreciate the seriousness of defendant's crimes.

4. Criminal Law § 138— armed robbery—aggravating factors—age of victims

The trial court improperly found as aggravating factors in armed robbery judgments that the victims were "very old" and that the female victim was "physically infirm" where there was no evidence tending to show that the victims were selected as victims because of their age, that they were any more vulnerable to being robbed at gunpoint than anyone else, or that the consequences of such robbery were in any way more severe.

5. Criminal Law § 138— same evidence to support different aggravating factors

The trial court erred in relying on the same evidence to support findings that defendant has served prior prison terms, that defendant has a long

State v. Wheeler

history of prior criminal activity, and that defendant has prior convictions for offenses punishable by more than sixty days confinement.

APPEAL by defendants from *Albright, Judge*. Judgments entered 1 February 1983 in Superior Court, WATAUGA County. Heard in the Court of Appeals 20 August 1984.

Defendant Wheeler was charged in proper bills of indictment with the following offenses: armed robbery of Frank Brown (82CRS3290), armed robbery of Mattie Brown (82CRS3291), felonious breaking or entering the Brown residence (82CRS3615), felonious breaking or entering the residence of John and Felicia Long and felonious larceny of their property (82CRS3289), two counts of assaulting a law enforcement officer with a firearm (82CRS3294, 82CRS3295), discharge of a firearm into an occupied vehicle (82CRS3577), and kidnapping (82CRS3298). Defendant Hammett, whose case was consolidated for trial with that of defendant Wheeler, was charged in proper bills of indictment with the same offenses as Wheeler, and was also charged with misdemeanor escape from the Watauga County Jail. Both defendants were charged with additional offenses that did not result in convictions and which are not herein discussed. Both defendants were found guilty of two counts of armed robbery, one count of felonious breaking or entering of the Brown residence, one count of misdemeanor breaking or entering the Long residence and felonious larceny, two counts of assault on a law enforcement officer with a firearm, one count of attempt to discharge a firearm into an occupied vehicle, and one count of false imprisonment. Defendant Hammett was also found guilty of misdemeanor escape.

The court entered judgments on the verdicts on 1 February 1983. Defendant Wheeler was sentenced to the maximum term of forty years for the armed robbery of Frank Brown. For the armed robbery of Mattie Brown, defendant Wheeler received a forty-year term. The offenses of felonious larceny, felonious breaking or entering, and misdemeanor breaking or entering were consolidated for judgment, and defendant was sentenced to a ten-year term for these convictions. Also consolidated for judgment were the offenses of attempt to discharge a firearm into an occupied vehicle and assault on a law enforcement officer with a firearm (two counts), with defendant Wheeler receiving a five-year prison sentence for these convictions. Defendant Wheeler

State v. Wheeler

was sentenced to a two-year term for his conviction of false imprisonment. Judge Albright ordered that each term was to run consecutively, rather than concurrently, resulting in a combined sentence of ninety-seven years. Defendant Wheeler appealed.

Defendant Hammett was sentenced to a forty-year term for the armed robbery of Frank Brown and to a consecutive twenty-year term for the armed robbery of Mattie Brown. The offenses of felonious larceny, misdemeanor breaking or entering, false imprisonment, and misdemeanor escape were consolidated for judgment, and defendant Hammett received a prison sentence of ten years for these offenses, to run consecutive to the forty-year term. Also consolidated for judgment were the offenses of attempt to discharge a firearm into an occupied vehicle, felonious breaking or entering, and assault on a law enforcement officer with a firearm (two counts), with defendant Hammett receiving a prison sentence of ten years for these offenses, to run consecutive to the term imposed for larceny, breaking or entering, false imprisonment, and escape. The total length of the combined sentences received by defendant Hammett is thus sixty years. Defendant Hammett appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Norma S. Harrell, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant Wheeler.

Robert H. West for defendant Hammett.

HEDRICK, Judge.

[1] Defendants first assign error to entry of judgment for two counts of armed robbery, contending that the evidence supports only a single conviction of armed robbery. The State's evidence tended to show that defendants were armed with rifles when they entered the home of Frank and Mattie Brown. The Browns, both eighty years old, had been married for approximately 60 years at the time of the crime. While defendant Wheeler held the Browns at gunpoint, defendant Hammett wandered through the house, during which time Hammett drank some cough syrup that had been prescribed for Mrs. Brown. Defendant Hammett also picked up a shotgun and shells belonging to Mr. Brown, handing these

State v. Wheeler

items to defendant Wheeler, who took the gun and shells with him when he left.

Defendants contend that this evidence demonstrates only one instance of armed robbery. Each victim, they claim, had a special property interest in the item taken from the other as a result of their marital relationship and joint possession. The fact that each item was identified as the personal property of one person, defendants argue, is "not a material variance sufficient to convert these facts into two crimes." We disagree.

Resolution of this issue requires application of the "same evidence test" to the facts of the instant case. The "same evidence test" has been defined by our Supreme Court as follows: "Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment . . . or whether the same evidence would support a conviction in each case." *State v. Hicks*, 233 N.C. 511, 516, 64 S.E. 2d 871, 875 (1951) (citations omitted).

In *State v. Johnson*, 23 N.C. App. 52, 208 S.E. 2d 206, *cert. denied*, 286 N.C. 339, 210 S.E. 2d 59 (1974), this Court was confronted with a case involving facts similar to those of the instant case. In *Johnson*, the defendants were accused of robbing two men in a diner, taking personal property from each. We find the language of *Johnson* apposite here:

[W]e find that the same evidence would not support a conviction in each case. Evidence of a robbery of property from the first victim will not support a conviction of a robbery of different property from a different victim.

. . .

Here defendants threatened the use of force on separate victims and took property from each of them. They were not employees. It was not the employer who was robbed. Rather each separate victim was deprived of property. The armed robbery of each person is a separate and distinct offense, for which defendants may be prosecuted and punished.

Id. at 55-56, 208 S.E. 2d at 208-09. Nor are we persuaded by defendants' contention that the marital relationship of the victims dictates a different result in the instant case. In *State v. Horne*,

State v. Wheeler

59 N.C. App. 576, 297 S.E. 2d 788 (1982), this Court upheld defendant's conviction of two counts of armed robbery where the victims were married. The Court in *Horne* noted that the defendant had been charged in one bill of indictment with taking personal property belonging to one victim, the husband, and in another bill of indictment with taking personal property belonging to the other victim, the wife. Citing *Johnson*, the *Horne* Court held that the defendant's actions constituted two distinct offenses. We find *Johnson* and *Horne* controlling in the instant case and so find the assignments of error without merit.

[2] Defendants next contend that "the evidence was insufficient to support the conviction for the Brown breaking and entering." They argue that all the evidence shows that the Browns consented to defendants' entry into the Brown home, thus barring a finding that defendants "broke" or "entered" the home as those terms are used in N.C. Gen. Stat. Sec. 14-54(a).

Felonious entry is defined in N.C. Gen. Stat. Sec. 14-54(a) as follows: "Any person who . . . enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." Our Courts have held that an entry is punishable under this statute only if it is wrongful, i.e., without the owner's consent. *State v. Boone*, 297 N.C. 652, 256 S.E. 2d 683 (1979). Where "consent" is obtained by fraud or trickery, however, the law treats defendant's action as a "constructive breaking," sufficient to sustain conviction under the statute. See *State v. Henry*, 31 N.C. 463 (1849); *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976).

In the instant case, there is no contention that defendants' entry into the Brown house was accomplished by an actual breaking. The State proceeded instead on a theory of "constructive breaking," and it was as to this theory that the trial court instructed the jury. Our inquiry is thus limited to whether the evidence of constructive breaking was sufficient to permit submission of the case to the jury.

In reviewing the sufficiency of the evidence, the law is clear that the evidence must be considered

in the light most favorable to the State, and the State is entitled to . . . every reasonable inference to be drawn there-

State v. Wheeler

from. [Citation omitted.] Contradictions and discrepancies are for the jury to resolve. . . . All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court. . . . If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made. . . .

State v. McKinney, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975); see also *State v. Thompson*, 59 N.C. App. 425, 297 S.E. 2d 177 (1982).

In the instant case, Mattie Brown testified as follows:

They [the defendants] come to the door, and I reckon, maybe the door might have been kindly open, I don't remember, but anyway, they told him that they wanted to call the Watauga Hospital.

Q. They told your husband that?

A. Yes. And so they come on—he told them well the phone was right there and the number was on the phone just to call. . . .

While it is true, as defendants contend, that Frank Brown testified on cross-examination that defendants had already entered the house when they asked to use the phone, this evidence merely created an inconsistency for the jury to resolve. It did not, contrary to defendants' contentions, require that the charges against defendants be dismissed. Because the evidence, taken in the light most favorable to the State, supports the conclusion that defendants obtained entry by means of trickery, this assignment of error must be overruled.

Defendants next assign error to the court's imposition of sentences exceeding the presumptive in those cases which are governed by the Fair Sentencing Act. N.C. Gen. Stat. Sec. 15A-1340.4. In his brief defendant Wheeler states that the trial judge "threw in the kitchen sink" when making findings in regard to aggravating factors, and argues that numerous factors found by the judge are unsupported by the evidence, are irrelevant to the purposes of sentencing, or are affected by other error of law. Our ex-

State v. Wheeler

amination of the factors found by the trial judge reveals several errors, and we hold that the judgments challenged by these assignments of error must be remanded for resentencing.

[3] Defendants first contend that the court erred in finding the following non-statutory factors in aggravation in connection with all of the judgments involving felonies:

The sentence pronounced is necessary to deter others from the commission of the same offense.

A lesser sentence than that pronounced by the Court would unduly depreciate the seriousness of the defendant's crime.

Our Supreme Court has held these considerations to be improper factors in aggravation. *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983); *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983).

[4] Defendants next contend that the court improperly found as aggravating factors in the armed robbery judgments that the victims were "very old" and that Mattie Brown was "physically infirm." We agree. Our case law makes clear that a finding of this factor is not necessarily appropriate in every case in which the victim might be described as "very old" or "physically infirm." See, e.g., *State v. Monk*, 63 N.C. App. 512, 305 S.E. 2d 755 (1983). Our Supreme Court has said that "vulnerability is clearly the concern addressed by this factor." *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E. 2d 689, 701 (1983). We find no evidence in this record tending to suggest that the Browns were rendered more vulnerable to being robbed at gunpoint because of their advanced age. There is no evidence tending to show that the Browns were targeted as victims because of their age, or even that defendants were aware of their age when they selected the Brown home to enter with intent to commit robbery. The record contains no evidence tending to show that the Browns suffered physical injury of any type, or that the emotional discomfort resulting from being victimized was greater or more severe than that experienced by most victims of serious crimes. In short, we find no evidence tending to show that the Browns were selected as victims because of their age, that they were any more vulnerable to being robbed at gunpoint than anyone else, or that the consequences of such robbery were in any way more severe.

State v. Wheeler

[5] Defendants also assign error to the following findings, present in all judgments forming the basis of this assignment of error:

[1] The defendant has served prior prison terms.

[2] The defendant has a long history of prior criminal activity.

Defendants do not contend that the court erred in finding the statutory factor that defendants have prior convictions for offenses punishable by more than sixty days confinement. They contend instead that in finding the above-quoted non-statutory factors as well, the court improperly relied on the same evidence as that used to support the statutory finding, in violation of G.S. 15A-1340.4(a). Our examination of the record reveals that all of the factors listed above are based on the same evidence—defendants' prior criminal records. This Court has held that this is error. *State v. Harris*, 67 N.C. App. 725, 313 S.E. 2d 915 (1984).

Our disposition of the case makes it unnecessary for us to discuss other errors made by the trial judge in the course of finding some ninety aggravating factors. For the benefit of the trial judge on remand we reiterate the admonition of this Court in *State v. Baucom*, 66 N.C. App. 298, 301-02, 311 S.E. 2d 73, 75 (1984):

In light of the increasing number of cases that have been remanded because of erroneous findings of non-statutory factors in aggravation, this Court deems it appropriate to remind trial judges that only one factor in aggravation is necessary to support a sentence greater than the presumptive term. The trial judge must determine that this factor is proved by a preponderance of the evidence and outweighs any mitigating factors. G.S. 15A-1340.4(b). "The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. [Citations omitted.]" *State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). With these rules in mind the trial judge may wish to exercise restraint when considering non-statutory aggravating factors after having found statutory factors. This prudent course of conduct would lessen the chance of having the case remanded for resentencing.

Pollock v. Reeves Bros., Inc.

See also State v. Benfield, 67 N.C. App. 490, 313 S.E. 2d 198 (1984).

In defendants' trials we find no error, but all cases—except case #82CRS3298, wherein defendant Wheeler was found guilty of false imprisonment—are remanded for resentencing.

Chief Judge VAUGHN and Judge WELLS concur.

WARREN N. POLLOCK, EMPLOYEE, AND BARBARA S. BECKWITH, WIDOW, BARBARA S. BECKWITH, GUARDIAN AD LITEM FOR MARNIE BECKWITH AND KATIE BECKWITH, MINOR CHILDREN OF PETER O. BECKWITH, DECEASED, EMPLOYEE, PLAINTIFFS v. REEVES BROTHERS, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8310IC812

(Filed 4 September 1984)

Master and Servant § 55.4— workers' compensation—personal and business use of employee's airplane—accident while maintaining airplane

An employee who owned an airplane which he maintained and kept for his personal use as well as for use when traveling for his employer was not injured by accident arising out of and in the course of his employment while he was returning from Georgia after having flown the airplane there to have new numbers painted on it even though the employer reimbursed the employee for part of the expense of maintaining the aircraft and paid for the gasoline used on the trip. Nor did the death of a second employee who had gone to Georgia to bring the first employee back to this State arise out of and in the course of his employment although he made the trip at the direction of his superior in the employer's company.

Judge WHICHARD dissenting.

APPEAL by defendants from order of North Carolina Industrial Commission entered 13 April 1983. Heard in the Court of Appeals 3 May 1984.

This appeal involves the question of whether an injury and a death are compensable under the Workers' Compensation Act. The evidence upon which the Hearing Commissioner made his decision showed that on 9 March 1982, Warren N. Pollock was a first vice-president of Reeves Brothers, Inc. and president of its Curon Division. Peter O. Beckwith was vice-president of the com-

Pollock v. Reeves Bros., Inc.

pany. Pollock was a pilot and owned a single-engine aircraft which he used for his own purposes and for business purposes for Reeves. Pollock maintained the plane and Reeves paid him \$2,500 per year plus payments for gasoline for his use of it while traveling for Reeves. Sometime prior to March 1982, Pollock purchased a twin-engine aircraft. He intended to sell his single engine aircraft and use the twin-engine plane.

Approximately two weeks before 9 March 1982, the Federal Aviation Authority assigned new numbers to the twin-engine aircraft. Pollock decided to fly the twin-engine plane to Commerce, Georgia on 9 March 1982 to have the new numbers put on the aircraft. He asked Beckwith to fly the single-engine plane to Georgia on that date with the intention that the two men would return home in it while the numbers were being put on the twin-engine plane. The gasoline used for the flight was charged to Reeves. While the two men were returning from Georgia, the single-engine plane crashed. Pollock was injured and Beckwith was killed.

The Hearing Commissioner found facts based on the above evidence. He also found what he denominated a fact that neither Pollock nor Beckwith had any business of Reeves to conduct on the trip and that neither was engaged in any function which was calculated to further either directly or indirectly Reeves' business. He found they were on a business trip connected with the maintenance of the twin-engine aircraft. He concluded that neither man sustained an injury arising out of and in the course of employment and denied compensation.

The plaintiffs appealed to the Full Commission which stated "We are of the opinion that the employees, on the occasion complained of, were engaged in an activity which they were authorized to undertake and which was calculated to indirectly benefit the employer." It substituted what it called findings of fact that neither Pollock nor Beckwith had any personal business to transact in Georgia and they were engaged in the discharge of a function which was calculated to further indirectly the business of Reeves. It concluded the two men were in accidents that arose out of and in the course of their employment. The Full Commission reversed the Hearing Commissioner and awarded compensation in both cases. The defendants appealed.

Pollock v. Reeves Bros., Inc.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by W. F. Maready, Robert J. Lawing, and Michael L. Robinson, for plaintiff appellee Warren N. Pollock.

Lloyd C. Caudle and Richard S. Guy for plaintiff appellee Barbara S. Beckwith, individually and as Guardian Ad Litem.

Hedrick, Feerick, Eatman, Gardner and Kincheloe, by Philip R. Hedrick and Martha W. Surles, for defendant appellants.

WEBB, Judge.

The facts in this case are not in dispute. The question is whether Pollock or Beckwith's heirs are entitled to workers' compensation for injuries and death in an accident that occurred while they were returning from a trip to have numbers put on an airplane which was owned by Pollock, and which he used while traveling on business for Reeves. The Hearing Commissioner's finding that neither man was engaged in any function which was calculated to further Reeves' business and the Full Commission's finding that they were so engaged were conclusions based on the undisputed facts. We hold that the Hearing Commissioner was correct in his conclusion and reverse the Full Commission.

We have not found a case which governs this case but we do not believe we should hold that when a person owns an airplane which he maintains and keeps for his personal use as well as for use when traveling for his employer, he is protected by workers' compensation while he is doing something to maintain the airplane and not doing anything else to promote the employer's business. We believe this is so although the employer reimburses him for a part of the expense of maintaining the aircraft and pays for the gasoline used on the trip. We do not believe that the Workers' Compensation Act was intended to cover accidents which occur while an employee is repairing his own property which he uses for himself and for his employer.

We receive some help from *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 293 S.E. 2d 807 (1982). In that case, the plaintiff leased his tractor-trailer to the defendant-employer. He was injured while repairing the tractor at a time when it was stopped while on a trip for the employer. Our Supreme Court said the plaintiff wore two hats, one as lessor and one as employee. Because the in-

Pollock v. Reeves Bros., Inc.

jury occurred while he was performing a duty as an employee, the accident was compensable. We believe an inference from this case is that if the accident had occurred while the plaintiff was not on a trip or using the truck for the employer, the accident would not have been compensable. This would be so although the repair of the truck would have been of some benefit to the employer.

We believe that for an activity of an employee to be held to be of some benefit to the employer so that an accident while engaged in that activity is compensable, it must be an activity as an employee. An accident during the repair of a truck as a lessor and not as a lessee would not have been compensable in *Hoffman*. In this case, although it may have been of some benefit to Reeves to have the correct numbers on the aircraft, we do not believe Pollock was acting as an employee in having the numbers put on the aircraft. It was his aircraft and he was doing what was necessary to maintain it for flight. This would not be a benefit to Reeves for workers' compensation purposes.

If Pollock was not promoting his employer's business, then neither was Beckwith. Although Beckwith may have made the trip at the direction of his superior at Reeves, this would not make the trip compensable because it was no more for the benefit of Reeves than was the trip by Pollock. *Burnett v. Paint Co.*, 216 N.C. 204, 4 S.E. 2d 507 (1939) and *Hales v. Construction Co.*, 5 N.C. App. 564, 169 S.E. 2d 24 (1969).

We reverse and remand for an order denying both claims.

Reversed and remanded.

Judge HILL concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

Pollock testified that many of the employer's facilities were so located that it was "very, very inconvenient" to use commercial airlines, and that he flew his own airplane for that reason. He further testified: that he acquired the single-engine aircraft "so that [he] would have transportation to [his] various business con-

Pollock v. Reeves Bros., Inc.

nections," and that he acquired the twin-engine plane "[t]o have a better airplane to fly on . . . business trips"; that there was a time limit for getting the new FAA numbers painted on the plane, although he did not know what it was; and that the new number had been assigned about two weeks prior to the trip in question. "There is no specific time limit that I know of," he stated, "but obviously if you are carrying an identification that says one number and the airplane has another number printed on it that is a kind of a problem, so we did want to get it done in due course."

Finally, and more importantly, Pollock testified that the morning of the accident "was really the only time that we could do this. We could have the airplane out of service . . .," he stated, "because we wouldn't be using it for the balance of the week." In context, the testimony implies that this was the only period during which Pollock knew the plane would not be needed for the employer's purposes, and that the morning of the accident was the only time during that period when his own business schedule permitted the trip.

The foregoing evidence indicates that Pollock purchased his planes primarily for use in the employer's business, and that while he was under no definite time constraint to get the new FAA numbers painted on the second plane, he chose the time in question because it was the only suitable time in terms of use of the plane in the employer's business. I believe that evidence thus could be held to sustain the Commission's "finding of fact" that at the time of the accident Pollock was "engaged in the discharge of a function which was calculated [to] further indirectly the employer's business."

Our Supreme Court has stated:

An appellate court is . . . justified in upholding a compensation award if the accident is "fairly traceable to the employment as a contributing cause" or if "any reasonable relationship to employment exists." (Citations omitted.) In other words, compensability . . . basically turns upon whether the employee was acting for the benefit of his employer "to any appreciable extent" when the accident occurred. (Citations omitted.) Such a determination depends largely upon the unique facts of each particular case, and in close cases, the benefit of the doubt concerning this issue should

Pollock v. Reeves Bros., Inc.

be given to the employee in accordance with the established policy of liberal construction and application of the Workers' Compensation Act.

Hoffman v. Truck Lines, Inc., 306 N.C. 502, 506, 293 S.E. 2d 807, 810 (1982). I consider the case, as to Pollock, extremely close. In light of the evidence set forth above, however, and of the Supreme Court's directive to give the employee the benefit of the doubt in close cases, I would affirm the award.

Even if Pollock were not engaged in promoting the employer's interests, however, it does not necessarily follow that Beckwith was not. Pollock was Beckwith's superior in the company. He directed that Beckwith make the trip.¹ Beckwith had flown the single-engine aircraft on business trips several times as the pilot in command. He had also flown with Pollock on business trips to the employer's facilities. Beckwith, therefore, presumably knew that the employer had authorized use of Pollock's planes for corporate purposes. Pollock clearly had at least apparent authority to direct or request that Beckwith accompany him on a trip relating to the flight readiness of a plane which Beckwith presumably knew would be used for corporate purposes. In these circumstances Beckwith should not be compelled to determine, at his peril, whether the requested activity would place him beyond the ambit of the Workers' Compensation Act.

Pollock was engaged in the task, arguably personal, of obtaining new identification numbers for his plane. He had discretion to determine whether to perform this task within or without the employer's working hours. He was not aware of any deadline for securing the new numbers. Beckwith, however, at the direction of his superior, was engaged in the task of securing the return of the superior to the employer's place of business so that the superior could perform tasks which, for corporate purposes, needed to be performed that day. He could have performed this task only at the time in question; and his performance at that time, because designed to insure the presence of his superior to perform corporate tasks in a timely manner, did have some "reasonable relationship" to the employment and was intended to

1. Pollock was asked at the hearing, "Did you direct [Beckwith] to plan for and to make this trip . . . with you?" He responded, "Yes, I guess you would have to say I did."

Pollock v. Reeves Bros., Inc.

benefit the employer to some "appreciable extent." *See Hoffman, supra*. The circumstances of the two employees, and the tasks in which they were engaged, thus properly may be regarded as different.

The following principles set forth by Judge (later Justice) Britt should control the decision here as to the award to Beckwith's dependents:

To be compensable an accident must arise out of the course and scope of employment. (Citation omitted.) Where the fruit of certain labor accrues either directly or indirectly to the benefit of an employer, employees injured in the course of such work are entitled to compensation under the Work[er's] Compensation Act. (Citations omitted.)

This result obtains especially where an employee is called to action by some person superior in authority to him It appears clear that when a superior directs a subordinate employee to go on an errand or to perform some duty beyond his normal duties, the scope of the Work[er's] Compensation Act expands to encompass injuries sustained in the course of such labor. (Citations omitted.) . . .

The order or request need not be couched in the imperative. It is sufficient for compensation purposes that the suggestion, request or even the employee's mere perception of what is expected of him under his job classification, serves to motivate undertaking an injury producing activity. So long as ordered to perform by a superior, acts beneficial to the employer which result in injury to performing employees are within the ambit of the act. (Citations omitted.)

Stewart v. Dept. of Corrections, 29 N.C. App. 735, 737-38, 225 S.E. 2d 336, 338 (1976). *See also* 1A, A. Larson, *Law of Workmen's Compensation* Sec. 27.40 (1983) ("When any person in authority directs an employee to run some private errand or do some work outside his normal duties for the private benefit of the employer or superior, an injury in the course of that work is compensable.")

I vote to affirm the award to Beckwith's dependents because I believe the foregoing principles, applied to the facts of this case, make it entirely proper. I vote to affirm the award to Pollock

Coleman v. Edwards

because, while of somewhat dubious propriety, I regard it as permissible in light of the directive to give the employee the benefit of the doubt.

JOHN RENO COLEMAN AND BETTY JORDAN COLEMAN v. CHARLES EDWARDS AND MARY STRICKLAND WARD, EXECUTRIX OF THE ESTATE OF DELLA H. COLEMAN

No. 8313DC1057

(Filed 4 September 1984)

1. Estates § 4.1— death of life tenant after lease of land—entitlement to rent

Where a life tenant executed a lease of land for the year 1983 six days before her death, and the rent for the entire year was paid to the life tenant's estate, the estate of the life tenant is entitled only to the proportion of the rent that had accrued prior to the death of the life tenant, and 359/365 of the rent should be paid to the remaindermen. G.S. 42-7.

2. Declaratory Judgment Act § 4.4— lease of land—effect of death of life tenant—entitlement to rent—actual controversy

There was a sufficient controversy between the estate of a life tenant and the remaindermen to permit a declaratory judgment as to whether the life tenant's death six days after the execution of a lease of land terminated the lease and as to who was entitled to the year's rent which had been paid to the estate of the life tenant. G.S. 1-253; G.S. 1-254; G.S. 1-255.

Judge HEDRICK dissenting.

APPEAL by defendant Mary Strickland Ward from *Wood (William E.)*, Judge. Judgment entered 29 April 1983 in District Court, COLUMBUS County. Heard in the Court of Appeals 20 August 1984.

This appeal arises out of an application filed on 8 March 1983 to have the Court declare the respective rights of the parties arising out of the administration of the estate of Della H. Coleman.

Plaintiffs own the remainder interest in certain land in which Della Coleman owned a life estate. On 1 January 1983 Coleman executed a lease of the land to Charles Edwards for the year of 1983. The rental price was \$3,500 and was due to be paid on or before 15 September 1983. Coleman died on 7 January 1983.

Plaintiffs alleged, among other things, that:

Coleman v. Edwards

Since Mrs. Coleman died six days after the execution of the Contract and Lease and all provisions of the Contract were still executory and no consideration had passed nor had the Lessee done anything to his detriment, does the Lease terminate and the property go to the Plaintiffs in accordance with their chain and source of title or is the Defendant, Charles Edwards, entitled to farm the land and the tobacco for the year 1983 under the terms of said Contract and Lease?

In her answer to this allegation, Coleman's executrix responded:

The allegations that . . . all the provisions of the lease and contract were still executory and that no consideration had passed and that the Lessee (Charles Edwards) had done nothing to his detriment are false and are hereby denied. The true facts are that the Lessee had paid the consideration for the lease and had taken positive steps of action in reliance upon the lease. Thus, the Lessee under the provisions of N.C.G.S. Sec. 47-7 is entitled to continue his occupation to the end of 1983.

Defendant Edwards, the tenant, made an identical answer.

Plaintiffs allege the following:

That the aforementioned Contract and Lease contains the following provision: "Said party of the Second Part, Edwards, has placed a trailer home upon the premises of Mrs. Coleman, but said party of the second part retains ownership of said trailer home and retains the right to move the trailer home, a 1965 Kentuckian 10 foot x 45 foot, at his discretion. The party of the second part also retains the right to remove the water pump, plumbing and the service pole at any time."

That as to said paragraph in said Contract and Lease, the following question has arisen:

Does the Lessee, Charles Edwards, have any right to continue to leave his trailer home upon the lands now owned by the Plaintiffs and does he have any right to remove the water pump, plumbing and service pole?

Coleman v. Edwards

In the answer to the allegation both defendants responded:

The right of the Defendant Charles Edwards to leave his trailer [sic] home upon the lands is inherent in the lease and will be determined by the validity of the lease. The right of the Defendant Charles Edwards to remove the water pump, plumbing and service pole is determined by ascertaining whether these items are "real fixtures" or "personal fixtures." The two Defendants have an express agreement, Plaintiffs' Exhibit "A," that these items are to retain their personal character and thus property of the Defendant Charles Edwards and subject to removal at Charles Edwards' will.

Plaintiffs also alleged:

That paragraph 4 of the aforementioned Contract and Lease contains the following provision: "Della H. Coleman hereby grants the right to transfer 12,000 pounds of tobacco to Farm Serial No. B-987, to wit: the farm lands herein being leased."

That as to said paragraph in said Contract and Lease, the following question has arisen:

Does the said Charles Edwards have any right to transfer 12,000 pounds of tobacco to the farm owned by the Plaintiffs herein?

Plaintiffs also asserted that there were other questions with respect to Edwards' right to sell part of the base tobacco allotment and with respect to his right to use some of the farm buildings. Defendants responded, in effect, that Edwards' rights were plainly set out in the lease.

Plaintiffs then asked for a judicial declaration on the following question: "That as to the aforementioned Contract and Lease, is the same valid and binding as to any provision or did it terminate at the time the life estate of Della H. Coleman, widow, the party of the first part, expired?"

Defendants responded:

It is stated that the contract and lease is valid and binding as to all the provisions and that pursuant to N.C.G.S. Sec.

Coleman v. Edwards

42-7 the lease and contract did not terminate at the time the life estate of Della H. Coleman expired at the death of Mrs. Della H. Coleman but rather shall continue until the end of the year 1983.

Both defendants' prayer for relief contained the following: "That the Court declare the lease and contract, Plaintiffs' Exhibit 'A,' to be valid and binding and in full force and effect; that the Court order the Plaintiffs to cease and desist in harassing the Lessee (Charles Edwards) in his efforts . . ."

After it was made to appear that the Edwards had paid the full rent and that it was in the estate account of Della H. Coleman, plaintiffs amended their complaint to set out the following:

That the Lease provides for a payment of \$3,500.00 and the question that arises therefore is as follows:

Does [sic] the monies paid for this Lease fall outside of the Estate and become the property of the remainderman or does it belong to the Estate with the remainderman having no interest in the same?

In pertinent part the Court concluded as follows:

That the lease which forms the subject of this controversy, recorded in Book 345, page 456, Columbus County Registry, is valid and binding for one year and that the said Charles Edwards has the right to transfer 12,000 lbs. of tobacco to the farm which forms the subject of this lease, but does not have any right to sell ten percent (10%) or any percent in excess of the base allotment of 6,431 lbs., since any sale would be detrimental to the remaindermen and extend past one year and (that the \$3,500.00 paid as rent is 6/365 property of the estate and 359/365 of the property of the Plaintiffs) and that the said Charles Edwards shall within twenty (20) days from the date of this Order move from the premises the mobile home, service pole and water pump which are his sole and separate property and that he has no right to the use of any buildings on the lands.

Defendant executrix appealed. Defendant Edwards did not.

Coleman v. Edwards

Eubanks, et al., by James C. Eubanks, III, and Williamson and Walton, by Benton Walton, III, for plaintiff appellees.

Jerry Arnold Jolly, for defendant appellant Mary Strickland Ward, Executrix of the estate of Della H. Coleman.

VAUGHN, Chief Judge.

[1] The only question raised on appeal is by defendant executrix. She contends the court erred in ordering her as executrix to pay the remaindermen 359/365 of the \$3,500.

The court made no finding as to the exact date the rent was paid and placed into the account of the estate. The executrix apparently contends that the remaindermen are due only the payments coming due "since the last payment." She further argues that since the statute does not expressly require it, she is not required to pay anyone anything. She argues that the statute only requires the tenant to pay the succeeding owner the rent accrued since the last payment, and that the rights of the tenant against the estate are not before the court.

The applicable statute is as follows:

When any lease for years of any land let for farming on which a rent is reserved determines during a current year of the tenancy, by the happening of any uncertain event . . . the tenant . . . shall continue his occupation to the end of such current year . . . and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor . . .

G.S. 42-7.

Here the rent for the entire year had been paid to the life tenant's estate. The court correctly declared that the estate of the tenant-lessor was only entitled to the proportion of the rent that had accrued prior to the death of the tenant. The court further correctly declared that the executrix of the estate should pay the rest of the rent, \$3,442.47, to the remaindermen.

[2] Although all parties, at trial and on appeal, urge different judicial declarations as to the effect of the lessor's death on the

Coleman v. Edwards

lease and the person entitled to the rent, the dissent would have us declare that the court did not have "jurisdiction" because the parties have "merely requested the court to give the parties legal advice as to the interpretation of the terms of the lease, wherein no controversy exists."

In addition to the very familiar provisions of G.S. 1-253 of the Uniform Declaratory Judgment Act, the following provisions are also relevant to the appeal:

G.S. 1-254. Any person interested under a . . . written contract . . . or whose rights . . . are affected by a . . . statute, . . . contract or franchise may have determined any question of construction or validity arising under the instrument, statute, . . . contract, or franchise, and obtain a declaration of rights, status, or other legal relations. . . .

G.S. 1-255. Any person interested as or through an executor, . . . creditor . . . of the estate of a decedent . . . may have a declaration of rights or legal relations in respect thereto:

. . . .

- (3) To determine any question arising in the administration of the estate. . . .

We feel that when the case is construed with the liberality required by the Uniform Declaratory Judgment Act, it is clear to us that there was and is a controversy between the parties. G.S. 1-264 requires: "This Article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered."

It is not hard for us to understand that plaintiffs claimed that the life tenant's death six days after the execution of the lease of the farm terminated the lease. Defendants, on the other hand, contended that the lease would continue for the full year with the tenant entitled to all the rights he would have had if the life tenant had survived the year. We also have no difficulty understanding that plaintiffs claimed they were entitled to most of the rent money held by the executrix of the estate. The executrix, on the other hand, claimed that all of the rent paid belonged to the estate.

Coleman v. Edwards

Although the existence of a genuine controversy is made more explicit here than in *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949), we think the language used by Justice Ervin in holding that a dispute was shown to exist provides guidance as to how our court should review the records in these cases.

Candor compels the observation that the pleadings in the case at bar do not show the existence of a controversy between the parties as to the meaning of the will or as to their rights thereunder with the explicitness of allegation desirable in declaratory judgment actions. But when these pleadings are interpreted with extreme liberality, they do reveal by implication rather than by express averment that the plaintiffs and the defendants are in dispute as to whether the duties of Lawrence K. Mears as surviving trustee of the testamentary trust have ceased and as to the respective interests given to them by the will and codicil in the store property and the hotel property of the testator in Canton. In consequence, the court below was empowered to render a declaratory judgment covering these matters.

231 N.C. at 118-19, 56 S.E. 2d at 409-10.

Plaintiffs were clearly persons whose rights were affected by the effect of the lease and were entitled to a judicial declaration of those rights by the court. Defendants' allegations would have denied plaintiffs any rights to the land during the term of the lease and would have denied them any right to the rent paid pursuant to the lease. We hold that the court properly declared the respective right of the parties, whether under G.S. 1-253, G.S. 1-254 or G.S. 1-255.

For the reasons stated, the judgment is affirmed.

Affirmed.

Judge WELLS concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

Although it has been raised directly by neither party, I must first consider whether the trial court had jurisdiction to enter any

Coleman v. Edwards

order. "An actual controversy between the parties is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act." *Kirkman v. Kirkman*, 42 N.C. App. 173, 176, 256 S.E. 2d 264, 266, *disc. rev. denied*, 298 N.C. 297, 259 S.E. 2d 300 (1979) (citation omitted).

While the Uniform Declaratory Judgment Act . . . enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.

Id. at 177, 256 S.E. 2d at 267 (quoting *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E. 2d 404, 409 (1949)). To put it more colorfully: "The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Kirkman* at 177, 256 S.E. 2d at 267 (citation omitted).

In the present case the plaintiffs have not alleged any facts demonstrating any controversy between themselves and either defendant or any controversy between the defendants. Plaintiffs have merely alleged that "certain questions" have arisen as to the construction of the lease. Plaintiffs have not alleged that either of the defendants has made any contention regarding construction of the lease. Nor have plaintiffs alleged that the lease is invalid or ambiguous in any way. Defendants, on the other hand, have merely alleged and prayed that the court declare the lease to be "valid and binding," in the absence of any suggestion that the lease is invalid or not binding. Plaintiffs have not alleged that they were entitled to immediate possession of the property when Ms. Coleman died, or that defendant Edwards has made any claim to any of the property adverse to the interests of the plaintiffs or defendant Ward. Although plaintiffs ask whether the rent of \$3,500.00 "fall[s] outside of the Estate and become[s] the property of the remainderman or . . . belong[s] to the Estate with the remainderman having no interest in the same," they have not alleged that

Ace-Hi, Inc. v. Dept. of Transportation

any controversy has arisen between the parties as to who is entitled to the money. In short, the parties, particularly the plaintiffs, have merely requested the court to give the parties legal advice as to the interpretation of the terms of the lease, wherein no controversy exists.

While it is true, as the majority states, that all parties "urge different judicial declarations as to the effect of the lessor's death on the lease and the person entitled to the rent" in the briefs filed in this Court on appeal, there is nothing in the record to indicate that any party urged such "different judicial declarations" at trial. Whether a court has jurisdiction to enter a declaratory judgment in a particular proceeding is determined from the pleadings filed in the cause, not from the briefs filed on appeal.

If it be conceded that the plaintiffs have sufficiently alleged that they are persons interested in the estate of Della Coleman so as to invoke the jurisdiction of the court to enter a declaratory judgment pursuant to G.S. 1-253 and 1-255, the court nevertheless should not have proceeded to judgment, since the record does not disclose that all persons having an interest in the administration of the estate were made parties to the proceeding. G.S. 1-260; *Edmondson v. Henderson*, 246 N.C. 634, 99 S.E. 2d 869 (1957); *Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 101 S.E. 2d 679 (1958); *Construction Co. v. Board of Education*, 278 N.C. 633, 180 S.E. 2d 818 (1971).

I vote to vacate the judgment.

ACE-HI, INC. v. DEPARTMENT OF TRANSPORTATION OF THE STATE OF
NORTH CAROLINA

No. 8310SC1035

(Filed 4 September 1984)

1. Highways and Cartways § 2.1— outdoor advertising sign— meaning of violation of control of access

A Department of Transportation regulation pertaining to revocation of a permit for an outdoor advertising sign for a "violation of the control of access" means either some interference with the fences or other barriers along the right of way or the entrance onto or exit from the highway at other than the officially designated points.

Ace-Hi, Inc. v. Dept. of Transportation

2. Highways and Cartways § 2.1— outdoor advertising sign permit—revocation for parking on shoulder of highway

The General Assembly did not intend, by its delegation of sign permit revocation authority to the Department of Transportation, to confer power on the Department of Transportation to provide for the automatic revocation of a sign permit for any violation of G.S. 136-89.58, and revocation of a sign permit was improper where the evidence showed only that the permittee's truck was parked on the shoulder of an interstate highway in violation of G.S. 136-89.58(5) while its employees were servicing its sign.

APPEAL by petitioner from *John C. Martin, Judge*. Judgment entered 7 July 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 8 June 1984.

Attorney General Edmisten, by Thomas H. Davis, Jr., for the State.

McLean, Stacy, Henry & McLean, P.A., by William S. McLean, for petitioner-appellant.

BECTON, Judge.

An outdoor advertiser appeals from summary judgment upholding revocation of a sign permit. Finding error in the application of the governing statutes, and finding the evidence insufficient, we reverse.

I

The Department of Transportation (DOT) issued petitioner Ace-Hi, Inc. (Ace-Hi) a permit to erect and maintain an outdoor advertising sign along an interstate highway. On 16 December 1982 a government official observed an Ace-Hi truck parked on the shoulder of the interstate and Ace-Hi employees servicing the sign. DOT regulations allow revocation of sign permits for, among other things, "unlawful violation of the control of access" along interstate highways. 19A N.C. Admin. Code § 2E .0210(9) (1983). It is unlawful to "willfully damage, remove, climb, cross or breach any fence" erected for access control, or to park on an interstate right-of-way except in emergency or at designated parking areas. N.C. Gen. Stat. § 136-89.58(5), (6) (1981). The DOT's district engineer accordingly revoked Ace-Hi's permit, citing the violation of the regulation and several previous violations. The Secretary of the DOT affirmed the revocation citing the same facts. On appeal, Ace-Hi presented uncontradicted evidence to the Superior

Ace-Hi, Inc. v. Dept. of Transportation

Court that it had never had any prior violations; the violations actually involved another company, *Ace Sign*. Nevertheless, the court granted summary judgment to the DOT, ruling that it was entitled to judgment upholding the Secretary's decision. From this order Ace-Hi appeals.

II

The parties do not dispute the facts as outlined above. Rather, the case involves only legal questions of proper exercise of authority and of interpretation of statutes and regulations. Consequently the case was ripe for summary disposition, *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), and on appeal, full appellate review of the legal basis for the judgment is proper. *N.C. Reins. Facility v. N. C. Ins. Guaranty Ass'n*, 67 N.C. App. 359, 313 S.E. 2d 253 (1984).

III

The Outdoor Advertising Control Act (OACA), codified at N.C. Gen. Stat. §§ 136-126 to -140 (1981 and Supp. 1983), contains its own procedure for judicial review, codified at G.S. § 136-134.1 (1981). Under G.S. § 136-134.1 (1981), an appellant from the decision and order of the Department of Transportation has the right to a hearing *de novo* in the Superior Court of Wake County; therefore, appellant is not limited to the administrative record. *Nat'l Advertising Co. v. Bradshaw*, 48 N.C. App. 10, 268 S.E. 2d 816, *disc. rev. denied*, 301 N.C. 400, 273 S.E. 2d 446 (1980).

Although the scope of review *de novo* is broad, *In re Wright*, 228 N.C. 301, 45 S.E. 2d 370 (1947), the superior court may take action only if the agency decision is "(1) [i]n violation of constitutional provisions; or (2) not made in accordance with [the OACA or the regulations thereunder]; or (3) affected by other error of law." G.S. § 136-134.1 (1981). Thus, the superior court has the implied power to reverse when the evidence does not support the decision. *Nat'l Advertising Co. v. Bradshaw*, 60 N.C. App. 745, 299 S.E. 2d 817 (1983).

On appeal to the superior court, Ace-Hi presented substantial and uncontradicted evidence, beyond that in the administrative record, that it had no prior violations and that the DOT's finding to the contrary was totally unsupported. Rather than make or order new findings, however, the trial court granted summary

Ace-Hi, Inc. v. Dept. of Transportation

judgment to the DOT. It ruled that the DOT was "entitled to a judgment as a matter of law upholding the Decision and Order of the Secretary of Transportation," which decision and order contained the unsupported finding. No other evidence suggesting a different theory was introduced by the DOT. To the extent that the trial court's decision to affirm was based on all three findings of the Secretary, it clearly erred.

IV

Therefore, the court's order was correct only if it disregarded the unsupported finding. This would leave two findings: (1) that the truck had been parked along the interstate and (2) that this violation of access control required revocation of the permit. Are these alone sufficient to justify summary judgment for the DOT?

A

[1] G.S. § 136-133 (1981) requires a permit from the DOT for the erection or maintenance of an outdoor advertising sign. Such permit "shall be valid until revoked for nonconformance with" the OACA or regulations promulgated thereunder. *Id.* G.S. § 136-130(3) (1981) empowers the DOT to promulgate rules and regulations for the issuance of permits and for the administrative procedures for appealing agency decisions to revoke permits. Pursuant thereto, the DOT has promulgated the following regulation, 19A N.C. Admin. Code § 2E .0210 (1983):

Any valid permit issued for a lawful outdoor advertising structure *shall* be revoked by the appropriate district engineer for any one of the following reasons:

. . . .

(9) unlawful violation of the control of access on interstate, freeway, and other controlled access facilities; . . . [Emphasis added.]

Ace-Hi allegedly violated "control of access," causing its permit to be revoked. "Control of access" is not defined in the OACA or the regulations; the federal statutes and regulations also do not provide any definition. A "controlled access highway" is defined as one "on which access is permitted only at designated access points." 19 N.C. Admin. Code § 2E .0201(q) (1983). "Access" is

Ace-Hi, Inc. v. Dept. of Transportation

"a way by which a thing or place may be approached or reached." Webster's Third New International Dictionary 11 (1968). "Control" is a means of exercising "restraining or directing influence over" or to "have power over." *Id.* at 496. Clearly, then, "violation of the control of access" must ordinarily mean either some interference with the fences or other barriers along the right of way or the entrance onto or exit from the highway at other than the officially designated points. *See* N.C. Gen. Stat. § 136-89.49(2) (1981) ("controlled-access facility" defined in terms of "a controlled right or easement of access"); 23 U.S.C. § 111 (1982) (requiring federal approval for new points of access). A basic rule of statutory construction is that unless the words used therein have acquired some technical meaning or the context otherwise dictates, they must be construed in accordance with their common or ordinary meaning. *Lafayette Transp. Service, Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973). The same rule applies to administrative regulations. *See States' Rights Democratic Party v. State Bd. of Elections*, 229 N.C. 179, 49 S.E. 2d 379 (1948) and *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980) (both applying rules of statutory construction to regulations); 2 Am. Jur. 2d *Administrative Law* § 307, at 135-36 (1962).

We have reviewed the record with extreme care and have found no evidence (1) that there was an access control fence or other barrier between the sign and the vehicle or (2) that even if there was, that Ace-Hi employees had crossed said fence or barrier. The findings relied upon indicate that the *vehicle*, not the employees, violated control of access. The only evidence relevant to the vehicle showed simply that it was parked on the shoulder of the highway, not that it had entered the highway at a non-designated point or had crossed any fence or other barrier. Under the common and ordinary meaning of the statute and the regulations, then, the decision of the Superior Court and the DOT cannot be upheld on the evidence in the record.

B

[2] The record indicates that during the hearing on the motion for summary judgment, the DOT "expanded the definition" of unlawful violation of control of access to include *any* violation of G.S. § 136-89.58 (1981). The DOT now argues that summary judg-

Ace-Hi, Inc. v. Dept. of Transportation

ment was accordingly proper, since the truck was parked on the shoulder in violation of G.S. § 136-89.58(5) (1981), which makes it unlawful "To stop, park, or leave standing any vehicle, whether attended or unattended, on any part or portion of the right-of-way of said highways, except in the case of an emergency or as directed by a peace officer, or as [sic] designated parking areas."

When issues of interpretation of statutes or regulations arise, the construction adopted by those who execute and administer them is entitled to consideration. *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200 (1973). However, our courts have always stopped short of ascribing controlling weight to such constructions. See *Colonial Pipeline Co. v. Clayton*, 275 N.C. 215, 166 S.E. 2d 671 (1969). The primary task of the courts remains to ascertain and adhere to the intent of the Legislature. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). We do not believe that the Legislature intended, by its delegation of permit revocation authority to the DOT, to confer such sweeping power as the DOT attempts to exercise here.

A fundamental rule of construction is that when a literal construction of the statute or regulation would contravene its manifest purpose, the reason and purpose will be given effect and the strict letter disregarded. See *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978). G.S. § 136-133 (1981) provides that a permit "shall be valid until revoked for nonconformance" with the OACA or attendant regulations, and the administrative regulation also indicates that permits shall be revoked upon nonconformance. 19A N.C. Admin. Code § 2E .0210 (1983) (emphasis added). These provisions, read literally, appear to require automatic and mandatory revocation for any violation of the various grounds of nonconformance. *Id.* In determining whether a particular provision is mandatory or directory, however, the legislative intent must govern; the purpose of the statute, more so than the particular language selected, controls. *N.C. State Art Soc., Inc. v. Bridges*, 235 N.C. 125, 69 S.E. 2d 1 (1952) (interpreting "shall" as only directory under circumstances of case). See also 82 C.J.S. *Statutes* § 376, at 869-75 (1953). "The letter killeth, but the spirit maketh alive." 2 Cor. 3:6.

We must determine the legislative intent from the enactment as a whole. *In re Banks*. In the OACA, the General Assembly ex-

Ace-Hi, Inc. v. Dept. of Transportation

pressly found that "outdoor advertising is a *legitimate* commercial use of private property adjacent to roads and highways," and declared its intent to "*promote* the reasonable, orderly and effective display" of outdoor advertising. G.S. § 136-127 (1981). (Emphasis added.) The General Assembly recognized that the right to erect outdoor advertising has some compensable value. G.S. § 136-131 (1981). It took care to provide an extra measure of judicial review of permit revocations. G.S. § 136-134.1 (1981). And, perhaps most importantly, the enforcement provisions confer upon the DOT the options of criminal sanctions in addition to enforced conformance through injunction or removal (revocation of the permit). G.S. § 136-135 (1981). These provisions, read together with the sections under consideration, lead to the conclusion that the General Assembly did not intend that revocation be automatic upon nonconformance, and we adopt this construction.

Consideration of the results attending affirmance of the DOT's position reinforces our holding. If, as DOT contends, the provisions are mandatory and include *any* violation of G.S. § 136-89.58 (1981) absurd and unfair results could follow. For example, it is unlawful to drive upon "any curb" or "dividing line" on said highways. Suppose, for example, that an employee of Ace-Hi, while driving on an interstate around Raleigh, for whatever reason, drove a company truck up onto a curb and off again. Even if no members of the public were in the least inconvenienced or endangered, under the DOT's interpretation *all* Ace-Hi sign permits along Interstate 95 would be subject to revocation. We decline to engage in speculation that might lead to other absurd results. *In re Banks*. Instead, we reaffirm our conclusion, reached earlier, that "violation of control of access" means some interference with the fences or barriers controlling access or some entrance or exit from the highway at a non-designated point. The DOT's insistence on automatic revocation for violation of G.S. § 136-89.58 (1981) under the control of access regulation, and the trial court's adoption of that position in its grant of summary judgment to the DOT, are thus incorrect. The summary judgment for the DOT must therefore be reversed.

V

Since the case is properly in the General Court of Justice for *de novo* review pursuant to G.S. § 136-134.1 (1981), and since

Coastal Production v. Goodson Farms

there is no evidence in the record to support revocation of Ace-Hi's permit on any of the grounds enumerated in 19A N.C. Admin. Code § 2E .0210 (1983), it would be pointless to order further proceedings. Therefore, we reverse the order of the Superior Court and remand with instructions for the entry of summary judgment in favor of Ace-Hi.

Reversed and remanded.

Judges HILL and BRASWELL concur.

COASTAL PRODUCTION CREDIT ASSOCIATION v. GOODSON FARMS, INC.,
J. MICHAEL GOODSON AND WIFE, GREYLIN R. GOODSON; SAMUEL
LIEBEN; AMERICAN FOODS, INC.; JEFF D. JOHNSON, III, RECEIVER;
FEDERAL LAND BANK OF COLUMBIA, INC.; AND COMMODITY CREDIT
CORP.

No. 834SC842

(Filed 4 September 1984)

1. Appeal and Error § 11; Attorneys at Law § 7.4— award of attorney fees—no waiver of right to appeal

In an action on a promissory note, defendants did not waive their right to appeal an order awarding plaintiff attorney fees by signing a consent judgment which stated over the signature blocks, "CONSENTED TO AND ALL APPEALS WAIVED," where the judgment expressly provided for further judicial proceedings to establish attorney fees.

2. Attorneys at Law § 7.4— attorney fee provision of note—notice of intention to enforce

Notice received by defendants of plaintiff's intention to enforce the attorney fee provisions of a promissory note complied with G.S. 6-21.2(5) where defendants signed a consent judgment at least five days before the notice of hearing was served which provided that if defendants defaulted in their promised compliance with its payment terms, they would submit to a judgment for attorney fees.

3. Attorneys at Law § 7.4— attorney fee provision of note—range permitted by note and statute

Language in a promissory note requiring the debtors to pay a "reasonable attorney's fee of not less than ten per centum of the total amount due hereon" specified a specific percentage within the meaning of G.S. 6-21.2(1), and the note and that statute combined to set a range of reasonable attorney fees between 10% and 15%.

Coastal Production v. Goodson Farms

4. Attorneys at Law § 7.4— attorney fee provision of note—amount of fee—necessity for evidence and findings

Although the fixing of attorney fees for the collection of a promissory note within the range permitted by the note and by statute lay in the discretion of the trial court, the reasonableness of the award was required to be supported by evidence and findings of fact.

5. Attorneys at Law § 7.4— attorney fees for collection of note—fees for related actions

When other actions are reasonably related to the collection of the underlying note sued upon, attorney fees incurred therein may be properly awarded under G.S. 6-21.2. Therefore, time spent by plaintiff's attorney in bankruptcy, foreclosure and receivership actions which were connected to the collection of a note was properly considered by the court in setting the attorney fee for collection of the note.

6. Attorneys at Law § 7.4— attorney fees for collection of note—inclusion of "merit bonus"

Where the court found that plaintiff's attorney spent 361.5 hours of reasonable attorney time in the collection of a promissory note and that a reasonable value for his services was \$75 per hour, the court erred in awarding an additional amount as an attorney fee "because of the nature, complexity, responsibility and timeliness with which plaintiff's attorney represented his client," since such factors presumably were considered by the court in determining the reasonable hourly rate for the attorney's services.

APPEAL by defendants Goodson from *Lewis, John B., Jr., Judge*. Order entered 31 March 1983 in Superior Court, SAMPSON County. Heard in the Court of Appeals 4 May 1984.

Defendant debtors appeal from an order awarding plaintiff attorneys' fees in action on a security agreement and promissory note. Facts are set out as necessary in the opinion.

Poyner, Geraghty, Hartsfield & Townsend, by Cecil W. Harrison, Jr., for defendant appellants Goodson Farms, Inc., J. Michael Goodson and Greylin R. Goodson.

Wells, Blossom & Burrows, by Richard L. Burrows, for plaintiff appellee.

JOHNSON, Judge.

I

Plaintiff, an agricultural credit facility, filed suit in February 1982 on a promissory note executed by the Goodson defendants

Coastal Production v. Goodson Farms

(hereinafter "defendants") and secured by farm real estate and equipment. In December 1982, the parties entered into a consent judgment by which plaintiff agreed to delay proceedings to February 1983. Defendants agreed to pay in full at that time. Defendants defaulted again, however, and plaintiff began seizure proceedings in March 1983. Plaintiff also filed a motion for attorneys' fees on 10 March 1983. The court granted the motion, from which order defendants appeal.

II

[1] Plaintiff contends first that defendants waived their right to appeal by signing the consent judgment, which read over the signature blocks "CONSENTED TO AND ALL APPEALS WAIVED." We find this argument without merit, since the judgment expressly provides for further judicial proceedings to establish attorneys' fees. Nothing in the judgment indicates any intent to waive appeals in such future proceedings, which presumably were contemplated to be adversarial in nature. The very nature of consent judgments further suggests that the agreement to waive appeal, as intended by the parties at the time of signing, extended only to the consent judgment itself. See *In re Will of Stimpson*, 248 N.C. 262, 103 S.E. 2d 352 (1958) (contract principles apply). Waiver of right to appeal must be voluntary and intentional. *Redevelopment Comm. v. Weatherman*, 23 N.C. App. 136, 208 S.E. 2d 412 (1974). And such agreements must be clear and unambiguous. See 4 Am. Jur. 2d Appeal and Error § 236 (1962). The language relied on does not meet this standard relative to subsequent proceedings. At hearing, both sides unequivocally indicated their intent to preserve their right to appeal any adverse ruling. Plaintiff's argument accordingly is without merit and the appeal is properly before this Court.

III

[2] Defendants also attempt to raise a procedural bar, i.e., that plaintiff's motion for attorneys' fees could not be granted for failure to comply with the five-day prior notice requirement of G.S. 6-21.2(5). The statute does not require any particular form, other than mailing, for giving such notice. See *Binning's, Inc. v. Construction Co.*, 9 N.C. App. 569, 177 S.E. 2d 1 (1970) (letter sufficient). No particular time is specified other than "after maturity of the obligation by default or otherwise." G.S. 6-21.2(5). In the

Coastal Production v. Goodson Farms

present case, defendants signed a written consent judgment at least five days before the notice of the hearing was served. Defendants do not dispute the signature of their attorney thereon; therefore they received better service than the statute requires. The consent judgment clearly provided that if defendants defaulted in their promised compliance with its payment terms, which they did, they would submit to judgment against them for attorneys' fees. The purpose of the statute, to allow the debtor a "last chance" to pay the outstanding balance without attorneys' fees, was thus more than amply satisfied. Having signed the consent judgment, defendants cannot now complain of inadequate notice. Defendants' argument therefore must fail.

IV

[3] Resolution of the merits of the controversy involves construction of the promissory note and the statutory provisions governing attorneys' fees. By signing the note, defendants agreed to pay a "reasonable attorney's fee of not less than ten per centum of the total amount due hereon, unless contrary to the laws of the state where this note is executed." This precise language has only been before this Court once before, at a time when such fees were still contrary to law, and thus was not construed, *Register v. Griffin*, 10 N.C. App. 191, 178 S.E. 2d 95 (1970); the decisions of other courts provide no guidance. The governing statute, G.S. 6-21.2, provides in relevant part:

Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

- (1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.

Coastal Production v. Goodson Farms

- (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, *without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.* (Emphasis added.)

The determinative question thus becomes whether subsection (1) or (2) applies. Does the language "not less than ten per centum" "specify any specific percentage?" We hold that it does. Therefore, subsection (2) does not apply. The quoted statutory language does not require specification of an exact or fixed percentage, or override minimum or maximum percentages: it becomes operative only on failure to specify *any* percentage. The General Assembly apparently intended G.S. 6-21.2(2) as a fall-back only in case the agreement contained nothing regarding the parties' intent as to what constituted a reasonable percentage. It apparently did not intend it as a means of legislating a total end to hearings on attorneys' fees. See *Credit Corp. v. Ricks*, 16 N.C. App. 491, 192 S.E. 2d 707 (1972) (remand for hearing on choice of law); *American Foods v. Farms, Inc.*, 50 N.C. App. 591, 275 S.E. 2d 184, *aff'd*, 304 N.C. 386, 283 S.E. 2d 517 (per curiam) (1981) (affirming result of hearing). Plaintiff apparently reads *American Foods* as requiring imposition of the 15% fall-back figure; it is clearly distinguishable, as are the other cases applying the automatic 15% figure, since in none of them did the parties specify any percentage at all. *Id.*; *Norlin Industries, Inc. v. Music Arts, Inc.*, 67 N.C. App. 300, 313 S.E. 2d 166 (1984); *Gillespie v. DeWitt*, 53 N.C. App. 252, 280 S.E. 2d 736, *disc. review denied*, 304 N.C. 390, 285 S.E. 2d 832 (1981); *Trust Co. v. Broadcasting Corp.*, 32 N.C. App. 655, 233 S.E. 2d 687, *disc. review denied*, 292 N.C. 734, 235 S.E. 2d 788 (1977); *Binning's Inc. v. Construction Co.*, *supra*.

Therefore, G.S. 6-21.2(1) applies. The provision in the note is "valid and enforceable up to but not in excess of fifteen percent." *Id.* The note and the statute combine to set a range of reasonable attorneys' fees between 10% and 15%. What the proper award was within this range was thus the question before the trial court at hearing.

Coastal Production v. Goodson Farms

V

Plaintiff contended at hearing that it was due some \$36,000 in attorneys' fees, or 15% of the outstanding balance at the date of institution of the action. The court refused to simply grant the motion for the 15%, but required plaintiff to put on evidence to justify its request, although the court allowed plaintiff to do so under protest. The court awarded plaintiff some \$36,000 in fees, only a few hundred dollars less than requested.

A

Defendants contend first that since plaintiff put on evidence regarding reasonableness of attorneys' fees, plaintiff is now estopped to assert that it is entitled to 15% under G.S. 6-21.2(2). They rely on *American Foods v. Farms, Inc.*, *supra*, in that case, unlike this one, however, plaintiff's attorney did not submit his information to the court under protest or otherwise effectively object or except to the procedure. *American Foods* does not control. Nevertheless, since we have already determined that G.S. 6-21.2(2) does not apply, this question is moot.

B

[4] The amount awarded by the court fell within the range we have determined was proper. When the court determines that an award of attorneys' fees is appropriate, but such amount is not fixed by statute or otherwise, the amount ordinarily lies within the discretion of the court. *Hill v. Jones*, 26 N.C. App. 168, 215 S.E. 2d 168, *cert. denied*, 288 N.C. 240, 217 S.E. 2d 664 (1975). The fixing of attorneys' fees within the permissible range in the present case therefore lay in the discretion of the court. As such, the order is conclusive in the absence of abuse or arbitrariness or some error of law. *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363 (1962) (discretion guided by law). In other contexts where discretionary attorneys' fees are allowed by statute, the law requires evidence and findings of fact supporting the reasonableness of the award. *See Falls v. Falls*, 52 N.C. App. 203, 278 S.E. 2d 546, *disc. review denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981) (child custody case); *In re Ridge*, 302 N.C. 375, 275 S.E. 2d 424 (1981) (caveat proceeding). We see no reason for not applying the same rule here.

Coastal Production v. Goodson Farms

C

[5] The court found as fact that plaintiff's attorney undertook various duties, including participating in bankruptcy and foreclosure actions regarding this estate and acting as commissioner for sale of the collateral. Plaintiff argues that such time was properly chargeable to collection of the note since it was spent preserving for collection the assets of the estate and expediting ancillary proceedings used by defendants to delay eventual recovery. Defendants argue that the court abused its discretion in allowing such fees.

The statute allowing attorneys' fees in suits on notes established "a far-reaching exception" to the long-standing rule against allowing such fees as costs. *Supply, Inc. v. Allen*, 30 N.C. App. 272, 276, 227 S.E. 2d 120, 124 (1976). It is a remedial statute and should be construed liberally, *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 266 S.E. 2d 812 (1980); narrow constructions are to be avoided. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973). The North Carolina cases which have considered the scope of attorneys' fees statutes have generally focused on the nature of the basic obligation sued upon, not the scope of activities related to that obligation. See for example *Bowman v. Chair Co.*, 271 N.C. 702, 157 S.E. 2d 378 (1967) (costs for unwarranted refusal not awarded in workers' compensation suits); *Credit Corp. v. Wilson*, 281 N.C. 140, 187 S.E. 2d 752 (1972) (guaranty contract not a "security agreement," no costs); *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976) (suit for reimbursement for past child support not contemplated in attorneys' fees provision, no costs). Alternatively, the statutes have considered the procedural posture of the case in the context of the scope of statutory preconditions for award of fees. See *Hicks v. Albertson*, 18 N.C. App. 599, 197 S.E. 2d 624, *aff'd*, 284 N.C. 236, 200 S.E. 2d 40 (1973) ("institution" of suit made award proper despite settlement); *Craven v. Chambers*, 56 N.C. App. 151, 287 S.E. 2d 905 (1982) (new trial meant no damages and accordingly no fees).

Mindful of our duty to construe the statute liberally, and of the infinite variety of activities which attorneys may engage in to bring a case to successful settlement or verdict, we believe that when other actions are reasonably related to the collection of the underlying note sued upon, attorneys' fees incurred therein may

Coastal Production v. Goodson Farms

properly be awarded under G.S. 6-21.2. Nothing prohibits such an interpretation; the statute merely allows attorneys' fees "upon any note" "collected by or through an attorney at law." *Id.* The General Assembly did not limit those fees solely to those incurred directly in the prosecution of the action on the note. In fact, it recognized that in some cases "ancillary claims" would be necessary, without in any way barring attorneys' fees incurred in pursuing such claims. G.S. 6-21.2(5) (claims under G.S. 25-9-503). Reasonableness, not arbitrary classification of attorney activity, is the key factor under all our attorneys' fees statutes. *See* G.S. 6-21.1; 6-21.4; 50-13.6; 50-16.4; *Falls v. Falls, supra*. Of course, the burden remains on the claimant to present evidence that the other proceedings are reasonably related to collection of the note. *See Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980) (burden of proof on claimant in child support case). Our result, that participation in other proceedings may be allowed as costs, is consistent with the position of the United States Supreme Court. That Court has approved *disallowance* of an award of fees in other litigation where such proceedings could neither disturb the prosecution of the present suit nor affect its outcome. *United States v. Equitable Trust Co.*, 283 U.S. 738, 51 S.Ct. 639, 75 L.Ed. 1379 (1931). By extension, allowance of fees for participation in other proceedings to expedite collection or preserve assets would not constitute abuse of discretion.

Applying the foregoing principles, we have reviewed the record of hearing and the court's findings of fact. We are satisfied that the evidence supports the court's finding that the bankruptcy, foreclosure and receivership actions and other legal activity undertaken by plaintiff's attorney were "connected" to the collection of the note, and we are further satisfied that the court's conclusion suffices on this record under the reasonable relation test we have articulated above. Therefore, defendants have shown no abuse of discretion in this respect.

D

[6] The court found that plaintiff's attorney spent 361.5 hours of reasonable attorney time in the matter and that a reasonable value for his services was \$75 per hour. Multiplied together, these figures yield a total of \$27,112.50. The court awarded plaintiff \$36,356.91, however, including "additional amounts that should be

Coastal Production v. Goodson Farms

awarded because of the nature, complexity, responsibility and timeliness with which plaintiff's attorney represented his client in this manner [sic]." Defendants contend that this inclusion of "bonus" fees amounted to an abuse of discretion.

We find no North Carolina authority to support the court's action. It is true that the quality of services rendered is properly considered in awarding fees, *Hill v. Jones, supra*, as well as the nature of the services required, and hence the scope and complexity of the case. *See Brown v. Brown*, 47 N.C. App. 323, 267 S.E. 2d 345 (1980). However, we must conclude that the court considered these factors in determining the reasonable hourly rate for the attorney's services. Had it wished to set a higher hourly rate in view of the complexity of the case, the court could have done so. We find no North Carolina authority for an award of a "merit bonus," however. Even assuming such bonuses are allowed, as under federal practice, that should occur only in the "rare case" where the applicant specifically shows superior quality representation and exceptional success. *See Blum v. Stenson*, --- U.S. ---, 104 S.Ct. 1541, 79 L.Ed. 2d 891 (1984). Plaintiff has not made the showing required by *Blum*. The addition, therefore, lay beyond the court's discretion, and we hold that the order awarding fees must be modified accordingly.

VI

We find no merit in any of defendants' other arguments. The order appealed from is accordingly affirmed with the modification described above.

Affirmed and modified.

Judges WELLS and BECTON concur.

State v. Rawls

STATE OF NORTH CAROLINA v. JEFFERY MICHAEL RAWLS

No. 8325SC1160

(Filed 4 September 1984)

1. Robbery § 4.3— armed robbery—intent permanently to deprive owner of property— sufficiency of evidence

The State's evidence was sufficient to show that items of personal property alleged in the indictment were taken with the intent permanently to deprive the owner of them so as to support defendant's conviction of armed robbery where it tended to show that defendant and a companion threatened the victim with a gun as she closed her store; the victim resisted and threw items in a paper bag she was carrying and her purse at her assailants; the victim was forced to the ground in a struggle with her assailants; and the paper bag, items of the victim's personal property and a mask used by one robber were later found some 500 feet from the crime scene.

2. Criminal Law § 169.6— failure of record to show excluded testimony

The exclusion of testimony cannot be considered prejudicial error where the record fails to show what the excluded testimony would have been.

APPEAL by defendant from *Cornelius, Judge*. Judgment entered on 13 May 1983 in Superior Court, CATAWBA County. Heard in the Court of Appeals on 22 August 1984.

Attorney General Rufus L. Edmisten by Associate Attorney Barbara P. Riley for the State.

Appellate Defender Adam Stein by Assistant Public Defender Marc D. Towler for defendant appellant.

BRASWELL, Judge.

During an armed robbery Mabel Suddreth, part owner of the South Center Quik Stop in Hickory, fought furiously with her attackers, one of whom was the defendant Rawls. His companion, Lester Craft, testified for the State pursuant to a plea agreement. Upon being convicted, Rawls appeals.

Defendant assigns as error the denial of his motion to dismiss, contending that the evidence was insufficient to show that the items of personal property alleged in the indictment were taken with the intent to permanently deprive the owner of them. The defendant also argues a fatal variance between proof and the indictment. We find no error.

State v. Rawls

According to the testimony of Lester Craft, he and Rawls had made plans two days earlier to rob the store. The day before the robbery Rawls brought a BB pistol to Craft's house, stating that in the dark it would probably scare the woman enough to make her give up the money. Both men lived within two blocks of the Quik Stop.

On the day of the robbery Rawls went to Craft's house with two masks and the gun. They planned to commit the robbery by each approaching a separate side of the store. Rawls was to hold the gun while Craft grabbed the victim and searched her for money.

As she closed the store that night, Ms. Suddreth gathered up several items (including cereal, milk, and feminine products, those later mentioned in the bill of indictment as taken in the robbery) for her personal use. She put the cash from the register in her hip pocket and left the store through the back door at approximately 12:15 to 12:25 a.m. As she walked toward her nearby car, an individual, later identified as the defendant, wearing a Halloween mask confronted her with what appeared to her to be a gun. She started backing up, stating that the person would have to shoot her because she was not giving up her money. A second person then popped up near her car and advanced on her.

Craft, who later admitted he was this second person, grabbed Ms. Suddreth around the waist and looked unsuccessfully in her pockets for the money. They both fell to the ground as they struggled. After Craft extricated himself from the struggle, Rawls hit Ms. Suddreth in the head with the BB gun. Both men fled.

The evidence showed that in resisting the encounter Ms. Suddreth first backed up, swung her key chain to try to divert the gun barrel, then threw the items in the bag she was carrying and her purse at the attackers. She was knocked to the ground and received injuries which required stitches. She never saw the bag or the grocery items again.

Officer Hamby arrived shortly, and in searching the area in the direction in which the assailants had fled, found a mask and one or two other items 400 to 500 feet from the rear door of the Quik Stop. Evidence Technician Holsclaw also went to the area

State v. Rawls

where Officer Hamby had seen the mask, and found a brown paper bag, a box of New Freedom Sanitary Napkins, and Tampax Tampons about 500 feet from the rear door of the store. Holsclaw also picked up a quart container of milk and a box of cereal near the rear door of the store, and a pack of cigarettes in the lower parking lot near Tenth Avenue South.

Officer Hamby promptly conducted a stakeout in a nearby area. After approximately forty-five minutes he saw two people walking south on Highway 127. One of them was the defendant Rawls.

Craft had testified that as he and Rawls left the scene they went home to see what would happen. Later, they walked toward the Quik Stop store on Highway 127 to see if the victim had dropped the money. A police officer stopped them.

[1] No money was taken from Ms. Suddreth. After the attackers left, she retrieved her purse with its contents still intact. "This evidence," says the defendant Rawls in his brief, quoted here to better present his argument,

was clearly insufficient to prove that defendant took or attempted to take the items alleged in the indictment with intent to permanently deprive the victim of them. While the State's evidence did tend to show that defendant intended to permanently deprive Ms. Suddreth of her *money* and attempted to take her *money*, that theory was not alleged in the indictment or submitted to the jury. The proof was therefore fatally at variance with the indictment and failed to establish the theory upon which the case was submitted to the jury.

While the defendant's motion to dismiss properly raised the issue of a fatal variance between the allegations of the indictment and the proof by evidence at trial, our case law holds that not every variance is sufficient to require the allowance of the motion. *State v. Tyndall*, 55 N.C. App. 57, 61, 284 S.E. 2d 575, 577 (1981). It is only "where the evidence tends to show the commission of an offense not charged in the indictment [that] there is a fatal variance between the allegations and the proof requiring dismissal." *State v. Williams*, 303 N.C. 507, 510, 279 S.E. 2d 592, 594 (1981).

State v. Rawls

The defendant was convicted of a violation of G.S. 14-87. This robbery statute forbids any person who uses, threatens to use, or has in his possession any firearm, whereby the life of a person is endangered or threatened, from unlawfully taking or attempting to take the personal property of another. The indictment in the present case charges that Rawls did feloniously:

steal, take, and carry away and attempt to steal, take and carry away another's personal property, one quart container of Pet milk; one brown paper bag; one pack of More cigarettes; one box of New Freedom Sanitary napkins; one box of [T]ampax tampons; one box of Rice Krispies of the value of \$10 dollars, from the presence, person, place of business, and residence of Mable Irene Sudderth (working at South Center Quik Stop). . . .

Here, a fair reading of the entire indictment shows that it alleges the commission of the offense of robbery with a dangerous weapon in violation of a specific criminal statute, G.S. 14-87. The verdict shows that the defendant was found guilty of robbery with a dangerous weapon. There is no variance between the offense charged and the offense for which Rawls was convicted.

As to the sufficiency of the evidence of the proof of the element that at the time of the taking the defendant intended to deprive Ms. Sudderth of the use of her property permanently, we point out the asportation of the brown paper bag containing items of personal feminine hygiene, as named in the indictment. These items were found, along with a mask used in the incident, approximately 500 feet from the back of the store where the gun was first used to threaten the life of Ms. Sudderth. Before any item was taken, the robbers had first planned to rob her with a "play BB pistol" to "probably scare her enough to make her give up the money." During the robbery, and with a gun pointed at her by Rawls, Ms. Sudderth said: "You will have to shoot, I am not giving up my money."

Ms. Sudderth's ensuing struggle with the robbers and the throwing of the brown paper bag and its contents of grocery and feminine items clearly shows that Rawls' and Craft's use of force and intimidation upon Ms. Sudderth both preceded and was concomitant with the taking of the items. The proof here met the requirement discussed in *State v. Richardson*, 308 N.C. 470, 477, 302

State v. Rawls

S.E. 2d 799, 803 (1983), "[t]hat . . . the use of force or violence must be such as to *induce* the victim to part with his or her property." (Emphasis in original.) In *Richardson* the defendant's robbery conviction was vacated. The facts show that the victim in *Richardson* was not concerned about anyone trying to rob him, but in self-defense threw his duffle bag in an encounter with the defendant. Two days later the victim discovered that someone had stolen \$17 from his wallet plus the duffle bag itself. The facts of our case are distinguishable in that it was the actual use of the gun and its initial threat to human life that induced Ms. Suddreth to part with her property. Except for the use of the gun, she would not have parted with her property.

As indicated in *State v. Jenkins*, 8 N.C. App. 532, 534, 174 S.E. 2d 690, 692 (1970), "In a prosecution for the offense of armed robbery under G.S. 14-87 the offense is complete if there is an *attempt* to take personal property by use of firearms or other dangerous weapons." Citing *State v. Parker*, 262 N.C. 679, 682, 138 S.E. 2d 496, 499 (1964), the *Jenkins* court recognized that "'it is not of controlling consequence whether the assailants profit much or little, or nothing, from their felonious undertaking.'" *Id.* Thus, when Ms. Suddreth was threatened with a gun in a pre-planned robbery, forced to the ground in a physical struggle to keep her money, and had items of her personal property taken some 500 feet from the place of the struggle, the jury could reasonably infer that the defendant and his companion were acting in furtherance of their unlawful purpose to steal in taking the items, and the offense became one of robbery with a dangerous weapon. It is also immaterial that it was not positively established by the evidence that the defendant or his companion took the items which were thrown. As stated in *Jenkins*, "No one was present . . . during the period when the [items] disappeared other than the prosecuting witness and [the defendant and his accomplice], who had made their unlawful purposes well known." *Id.*

The Supreme Court in *State v. King*, 299 N.C. 707, 714, 264 S.E. 2d 40, 45 (1980), a robbery case, recounted that:

In *State v. Walker*, 6 N.C. App. 740, 171 S.E. 2d 91 (1969), it was held that a sufficient taking was accomplished when the defendant took rings from the jewelry store counter and placed them in his pockets although he threw them on the floor as he fled from the store. There it was stated that:

State v. Rawls

"[t]he fact that the property may have been in defendant's possession and under his control for only an instant is immaterial if his removal of the rings from their original status was such as would constitute a complete severance from the possession of the owner." *Id.* at 743, 171 S.E. 2d at 93.

Therefore, the removal of the paper bag and its items of Ms. Suddreth's property some 500 feet along the path of departure from the scene is concomitant proof of the felonious intent to permanently deprive the owner of their use. The reasonable inference from the evidence is that the robbers thought that Ms. Suddreth's money might be concealed in the paper bag or in or among the itemized contents. It was reasonable to infer that the robbers took all her property in order to search through it later and keep what they reasonably believed they would find—her money. It is of no consequence on the facts here that no money was actually taken. What was actually taken by force was named in the indictment. The crime was completed. The defendant had a fair trial. As was said by Mr. Rawls' trial attorney (who is different from appellate counsel) after the sentencing: "Your honor, if I may, I have talked to Jeffery about the case and informed him that I felt that there was no error committed in the trial." To this we now concur.

We also find support in ordinary hornbook law. In the treatise Perkins on Criminal Law, 281, fn. 12 (2d ed. 1967), we read:

But the fact that D, who had taken X's wallet at gunpoint, dropped it in X's presence when it was found to be empty does not negate the *intent* to deprive X of his property permanently at the time of the taking and leaves D guilty of robbery.

Perkins further states in this same footnote, citing 4 W. Blackstone, Commentaries *241 as his authority, that "it is clear that the extent of the value of the property taken is unimportant."

[2] The second assignment of error brought forward questions the exclusion of evidence to show bias on the part of the State's witness, Lester Craft. The defendant contends that the judge erred in refusing to permit defense counsel to inquire about Lester Craft's knowledge of the possible punishment for armed robbery.

In re Appeal of Barham

The evidence shows that Craft had made a plea arrangement with the State by which he pled guilty to Common Law Robbery in return for his testimony against Rawls. Craft testified he understood he would have to serve ten years pursuant to his bargain.

The transcript filed with the case shows that when the questions, "You know what the penalty for attempted robbery is?" and "You know that you could receive fourteen years for attempted armed robbery?", were asked no answers were placed in the record. Although it would seem that the answers could and would have been relevant on the point of indicating bias or interest in testifying against Rawls, the defendant's failure to have Craft's answers placed into the record and preserved for appeal makes it "impossible for us to know whether the ruling was prejudicial to the defendant or not. . . . We cannot assume that the answer of the witness would have been in the affirmative." *State v. Poolos*, 241 N.C. 382, 383, 85 S.E. 2d 342, 343 (1955). *See also*, *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). Since the record leaves us to speculate as to Craft's answers, we can only say that the appellant has failed to carry his burden of proof of showing prejudicial error.

No error.

Judges HILL and BECTON concur.

IN THE MATTER OF: THE APPEALS OF JOYCE BARHAM AND JOSEPH BARBOUR, JR., FROM THE EXEMPTION OF CERTAIN PROPERTY OWNED BY LUTHERAN RETIREMENT MINISTRIES OF ALAMANCE COUNTY, NORTH CAROLINA, BY THE ALAMANCE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1982

No. 8310PTC1101

(Filed 4 September 1984)

Taxation § 22.1— residential retirement center—no charitable purpose—no exemption from ad valorem taxes

A residential retirement center operated by a non-profit corporation formed by a church was not being used for a charitable purpose within the meaning of G.S. 105-278.6 so as to qualify for exemption from *ad valorem* taxes

In re Appeal of Barham

where residents must pay admission fees ranging from \$15,000 to \$60,000 and monthly occupancy fees ranging from \$495 to \$1,485 depending upon the type of accommodations and care each resident requires; the church states that it has a moral commitment to subsidize residents who become unable to meet the monthly occupancy fee but residency contracts require payment of the fee as a condition of continued residence; and although a large sum of money for the project was advanced by an estate, the non-profit corporation intends to reimburse such money to the estate.

APPEAL by Lutheran Retirement Ministries of Alamance County, North Carolina from the 1 June 1983 decision of the North Carolina Property Tax Commission. Heard in the Court of Appeals 22 August 1984.

Lutheran Retirement Ministries of Alamance County, North Carolina (hereinafter LRM) is a non-profit corporation. LRM has purchased 62.9 acres of land upon which they plan to construct the Twin Lakes residential retirement center. LRM was formed to carry out the directions of Wade G. Coble's will regarding the establishment of a home for the elderly.

In his will Mr. Coble left the residue of his estate, approximately four million dollars, to Macedonia Evangelical Lutheran Church on the condition that they use the money to create a retirement home. The Church formed LRM to implement Mr. Coble's wishes. LRM developed the plan for Twin Lakes retirement facilities. Twin Lakes' facilities are to consist of a skilled nursing facility, an intermediate care facility, a retirement home and an independent living facility. Individuals are eligible for admission after they reach 62 years of age. The admission fees range between \$15,000.00 and \$60,000.00. Each resident must also pay a monthly occupancy fee ranging from \$495.00 to \$1,485.00. These fees are graduated based upon type of accommodations and care each individual requires. LRM states that it has a moral commitment to subsidize residents who become unable to meet the monthly occupancy fee at some time after they are admitted. Residency contracts, however, require payment of the admission of the fees as a condition of continued residence. LRM makes no legal commitment to subsidize residents unable to pay.

Based upon this plan for the development of the property LRM submitted an application for an exemption from property taxes contending that the property was to be used for a charitable purpose. The tax supervisor denied the petition and LRM

In re Appeal of Barham

appealed to the Alamance County Board of Equalization and Review. The Board approved the request. Joyce Barham and Joseph Barbour, private citizens and taxpayers of Alamance County, appealed this ruling to the North Carolina Property Tax Commission pursuant to N.C. Gen. Stat. § 105-324(b) (1977). LRM was allowed to intervene in the suit on 30 November 1982. On 25 January 1983 a hearing was conducted. On 1 June 1983 the Commission entered its final decision overruling the Alamance County Board of Equalization and Review. The Commission made numerous findings of fact and based upon these findings concluded that property did not qualify for the charitable purpose exemption and that the application must therefore be denied. From the decision, LRM appealed.

Vernon, Vernon, Wooten, Brown and Andrews, P.A., by John H. Vernon, III and R. Joyce Garrett, for Lutheran Retirement Ministries.

Joe Barbour, Jr., pro se, for appellees.

WELLS, Judge.

The scope of review for cases appealed from the Property Tax Commission is governed by N.C. Gen. Stat. § 105-345.2 (1979) which in pertinent part provides:

. . .

(b) [T]he court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court . . . may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or

In re Appeal of Barham

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

. . .

The dispositive issue presented by LRM is whether the Commission correctly concluded that its retirement home property was not being held or used for a charitable purpose within the meaning of N.C. Gen. Stat. § 105-278.6 (1973), which in pertinent part provides:

(a) Real and personal property owned by:

. . .

(2) A home for the aged, sick or infirm;

. . .

shall be exempted from taxation if: (i) As to real property, it is actually and exclusively occupied and used, . . . by the owner for charitable purposes; and (ii) the owner is not organized and operated for profit.

(b) A charitable purpose within the meaning of this section is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. . . .

Our decision to affirm the Commission is controlled by our decision in *In re Chapel Hill Residential Retirement Center*, 60 N.C. App. 294, 299 S.E. 2d 782, *disc. rev. denied*, 308 N.C. 386, 302 S.E. 2d 249 (1983).

In its order in this case, the Commission made the following pertinent findings of fact:

. . .

In re Appeal of Barham

(34) A document entitled "Twin Lakes Center—*Requirements for Admission*," which is included in the application packet, contains the following statement concerning financial status:

Applicants are required to fill out a Financial Statement listing assets, liabilities, and income that will satisfy Twin Lakes Center that the applicant will have adequate financial resources to pay the cost of residency at the Center, barring unforeseeable [sic] circumstances and assuming continuing inflation over the period of life expectancy. Applicants will certify this information as true to the best of their knowledge. At the request of the Executive Director, applicants will also be asked to verify their Financial Statements with communications from banks, trust officers, etc.

(35) The requirements for admission document also contains a statement concerning insurance status:

All applicants 62 years of age or more at the time of admission will be required to carry Medicare insurance A and B, if eligible, and one additional approved policy or supplemental health care policy with major medical provisions. Those not eligible for Medicare will be required to carry comparable health insurance as approved by the Admissions Committee. Benefits from all such insurance for services rendered or paid for Twin Lakes Center must be assigned to Twin Lakes Center.

. . .

(37) One of the registration forms for Twin Lakes Center requests financial data from the resident "in order that the Board of Lutheran Retirement Ministries will have assurance that your financial resources will be adequate to fulfill your needs as a resident."

. . .

(39) The Residency Contract provides that the monthly occupancy charge "shall be adjusted annually" on January 1 of each year. The adjustments "shall be determined by the costs of maintaining and operating the Retirement Center including reasonable reserves for operating capital and replacement of facilities."

In re Appeal of Barham

(40) Section 3.2 of the Residency Contract permits the Center to terminate the resident's right to occupy "if Resident fails to pay the Monthly Service Charge for the Living Unit or charges for other services and facilities provided by the Center."

(41) The Contract contains the following "Condition of Occupancy":

Resident's right to occupy shall be conditioned upon Resident meeting the minimum health and financial standards established by Twin Lakes and in effect on the Initial Occupancy Date. If Resident fails to satisfy such health or financial standards any portion of the admission fee that has been paid by Resident shall be refunded with interest and the Center shall have no other obligation to Resident under this Agreement.

. . .

(43) Under the Contract the resident agrees to pay all costs of collection, including attorney's fees, if the resident fails to pay any amount due under the Contract.

(44) Twin Lakes required a non-refundable application fee of \$100.00.

(45) The schedule of admission fees and monthly service charges for living units at Twin Lakes is as follows:

<u>Accommodations</u>	<u>Base Admission Fee</u>		<u>Estimated Monthly Service Charge</u>
	<u>One Occupant</u>	<u>Two Occupants</u>	
Independent Living:			
Efficiency			\$495 (single)
Apartments	\$15,000	\$15,000	\$645 (double)
Lakes Apartments:			
1 Bedroom	\$22,000	\$22,500	\$325
2 Bedroom	\$27,000	\$27,500	\$425
Lakes Duplex			
Apartments:	\$45,000	\$45,000	\$400
Cottages	\$60,000	\$60,000	\$550

In re Appeal of Barham

Health Center:**Intermediate Care**

Nursing	None	None	\$1125
Skilled Nursing	None	None	\$1485

(46) The schedule states that fees are subject to change without notice.

. . .

(52) The admissions committee had received 133 applications for admission as of the date of the hearing. The committee has rejected none of the applications and has received financial statements from 31 applicants who have paid 10% of their admission fee.

(53) Mr. Berg testified that in individual cases entrance requirements for Twin Lakes have been waived.

(54) The audited financial statement of the Coble Memorial Fund as of September 30, 1982, contains a "Note B—Financially Interrelated Organizations," which reads in part as follows:

The Fund advances money to the Ministries as needed These advances are non-interest bearing. The Ministries intends to repay the Fund after the life-care center becomes operational and self-supporting.

(55) The audited financial statement of the Lutheran Retirement Ministries of Alamance County as of September 30, 1982, contains a "Note B—Financially Interrlated [sic] Organizations," which includes a statement that "[m]anagement intends to repay the Fund after the life care center becomes operational and self-supporting."

(56) (Collectively, the residents of Twin Lakes will pay the total cost of all the services they will receive.)

(57) On June 30, 1982, the directors of LRM adopted a resolution which reads in part as follows:

BE IT RESOLVED that Lutheran Retirement Ministries shall actively review a request by an elderly person who does not have financial resources sufficient to meet the occupancy fee or service charges and shall, on a case by case basis, make a

In re Appeal of Barham

determination of the extent to which it can subsidize that person to a greater degree than it does other residents without impairing its ability to provide quality care to all residents.

(58) There is no legal obligation on the part of LRM to retain a resident who becomes unable to make monthly payments to Twin Lakes.

LRM contends that this case is distinguishable from *In re Chapel Hill Residential Retirement Center, supra*. One point of distinction relied upon by LRM is that a larger percentage of its funds are to be generated from outside sources. LRM points particularly to the gift from the Coble estate. LRM, while conceding that the costs to residents are high, further argues that these funds will not meet the total cost of care and that Twin Lakes must rely on outside gifts to supplement its revenues. LRM also distinguishes this case from *In re Chapel Hill Residential Retirement Center, supra*, by pointing to the relationship between LRM and the Lutheran Church. They point to the Church's "moral commitment" to provide funds for the facility should LRM fall short.

In order to qualify for an exemption from *ad valorem* taxes, property must be used for a humane and philanthropic purpose and it must be used to benefit a significant segment of the community. LRM argues that it meets the qualifications because Twin Lakes would provide for the basic social needs of its residents for love, safety and a sense of belonging. LRM further argues that a significant portion of the elderly in the Alamance County area would be able to afford these services.

We cannot agree with LRM's contentions. As we stated in *In re Chapel Hill Residential Retirement Center, supra*: "merely supplying care and attention to elderly persons cannot, alone constitute charity." Here, as in *In re Chapel Hill Residential Retirement Center, supra*, the residents will be paying large sums of money for the services rendered. While it is true that the bequest of Wade Coble furnished more outside money than was present in *In re Chapel Hill Residential Retirement Center, supra*, it also appears that the funding for the every day operation of the project will come mainly from the funds paid in by the residents. As the Commission found, financial statements from both the Coble Estate and LRM indicate that LRM intends to reimburse any

State v. Ford

monies advanced by Coble. Further, LRM's screening procedures, admissions guidelines and admission and occupancy fees are at such a level that common sense tells us that only a small percentage of the elderly could feasibly participate in LRM's retirement center. We would also note that while LRM talks of a "moral commitment" to furnish lifetime care to those residents who become unable to provide the fees mandated by the contract, LRM reserves the right to terminate any resident for non-payment of fees.

We have considered LRM's other assignments of error, find them to be without merit, and overrule them. Considering the whole record we hold that the findings and conclusions of the Commission are supported by competent, material and substantial evidence, and their order denying the exemption must be and hereby is

Affirmed.

Chief Judge VAUGHN and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. MILTON JOSEPH FORD

No. 8315SC1048

(Filed 4 September 1984)

1. Searches and Seizures § 11— probable cause to search vehicle

An officer had probable cause to believe that contraband was concealed in a vehicle driven by defendant so that a search of the vehicle was lawful where the officer had received radio messages informing him that the vehicle was stolen and that the vehicle and its occupants fit the description of the vehicle and persons involved in an armed robbery a few hours earlier.

2. Criminal Law § 66.9— photographic identification procedure—no impermissible suggestiveness

Photographic procedures in which two witnesses identified defendants as the perpetrators of an armed robbery were not impermissibly suggestive where each witness had an ample opportunity to observe the robbers at close range in a well-lighted store; the witnesses were able to identify each defendant from the photographic lineup without any hesitation; the identification occurred only a few hours following the robbery; and the individuals selected resembled initial descriptions of the robbers given by the witnesses.

State v. Ford

3. Criminal Law § 92—joinder on oral motion—no error

The State's motion for joinder of defendants' cases made at the beginning of trial came within the purview of G.S. 15A-951 and was not required to be in writing.

4. Robbery § 4.3—armed robbery—endangering life—use of shotgun

Evidence that one robber held a sawed-off shotgun less than a foot from a storekeeper's body was sufficient to prove that defendant endangered or threatened the storekeeper's life so as to support conviction of defendant for armed robbery.

APPEAL by defendant from *Bowen, Wiley F., Judge*. Judgment entered 8 December 1982 in ALAMANCE County Superior Court. Heard in the Court of Appeals 20 August 1984.

On 21 June 1982 Harvey Burnette, Jr., was employed at Joe's Shopwell Mini-Mart (hereinafter Joe's) in Burlington. Sometime between 12:00 a.m. and 1:00 a.m. two black males, one armed with a sawed-off shotgun, entered the store and robbed Burnette of \$360.00. The store was well lighted and Burnette was able to view the robbers for two or three minutes. Gregory Saunders, another store employee, was able to observe the robbers for three or four minutes in the store's parking lot prior to the robbery.

At approximately 3:30 a.m. Officer Kusz, a Durham Public Safety Officer, received a radio message reporting two suspicious black males in a light green Cadillac at the Guess Road exit to I-85. In route to investigate the complaint he received another radio communication which indicated that the occupants of the car were suspects in a Burlington robbery. As he was in the process of stopping the car, Kusz was advised by radio that the car had been reported stolen. Officer Kusz arrested the defendant, the car's driver, on the charge of possession of a stolen vehicle. Pursuant to the arrest and based upon his suspicion that he was involved in the robbery, Kusz and the officers assisting him searched the defendant and the Cadillac. Officer Kusz found \$150.00 on defendant's person. Officer T. E. Oliver who came to the scene to assist Kusz searched the vehicle and found a sawed-off shotgun, some shotgun shells, and a toy gun in the automobile's trunk.

Later that morning, Burnette went to the Burlington Police Department and gave descriptions of the individuals who robbed him. Burnette was then shown two groups of photographs; one set

State v. Ford

containing a picture of defendant and another group containing a picture of the other occupant of the green Cadillac. Burnette selected defendant and the other occupant of the vehicle as the persons who robbed him. Saunders also identified the same individuals in a separate photographic lineup.

Prior to trial defendant made motions to suppress the out-of-court and in-court identification of him by Burnette and Saunders, and to suppress the physical evidence seized from the defendant and the vehicle he was driving. Following a hearing on the motions, Judge Lewis entered an order on 6 November 1982, denying the motions.

At the conclusion of the pre-trial hearing on defendant's motions to suppress, the state made an oral motion for joinder of defendant's case with that of the other occupant of the vehicle. No ruling was made on the motion. At trial, the prosecutor again orally moved to join the cases. This motion was granted over the objection of the defendant.

At trial the state offered evidence which tended to show the facts set forth above. Defendant offered evidence tending to show an alibi defense. Defendant was convicted of robbery with a firearm and was sentenced to 14 years imprisonment, the minimum term allowed for such a conviction. From the judgment defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Holt, Spencer, Longest & Wall, by N. Madison Wall, II, for defendant.

WELLS, Judge.

Defendant contends the court erred by denying his motion to suppress the evidence seized pursuant to the search of his person and the vehicle, and by denying the motion to suppress the identification of the defendant, by joining the defendant's case for trial with the other occupant of the vehicle and by denying his motion to dismiss at the close of all the evidence for failure of the state to present sufficient evidence to take the case to the jury. We disagree with defendant's contentions and find no error in defendant's trial.

State v. Ford

[1] Defendant first argues the warrantless search of his person and of the vehicle was without probable cause and therefore illegal. He also argues that the court's order denying his motion to suppress is defective in that the evidence does not support the findings of fact and the findings of fact do not support the conclusions of law in the order.

Where police officers have probable cause to believe that contraband is concealed somewhere within a legitimately stopped automobile, they may conduct a search of the automobile that is as thorough as a magistrate could have authorized in a warrant. *United States v. Ross*, 456 U.S. 798 (1982). An officer has probable cause to believe that contraband is concealed within a vehicle when given all the circumstances known to him, he believes there is a "fair probability that contraband or evidence of a crime will be found" therein. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983).

The trial court in its order denying defendant's motion to suppress made the following findings of fact:

On or about the 21st day of June, 1982 at midnight a business known as Joe's Shopwell, located at South Mebane Street in the City of Burlington, N.C., was robbed when two black males entered the business and demanded that the person in attendance, Harvey Burnette, give them monies from the store. One black male was described as wearing an orange T-shirt and carrying a handgun, the other wearing a light-colored shirt and bow tie. The latter was carrying a sawed-off shotgun. After taking the money from the place of business, the two black males left in a light green or yellow Cadillac. At approximately 3:37 A.M., Officer J. J. Kusz of the Department of Public Safety in Durham, N.C. received a radio message that two black males in a light green Cadillac were acting in a suspicious manner at a service station in Durham. While enroute to the service station, the Officer observed this Cadillac at or near the intersection of I-85 and Guess Road in Durham, N.C. and proceeded to follow the vehicle. He received other radio messages indicating that the vehicle was a stolen vehicle and that the vehicle and its occupants fit the description of the vehicle and persons involved in an armed robbery in Burlington, N.C. Officer Kusz

State v. Ford

stopped the vehicle on the entrance ramp to I-85 and Guess Road and found the driver of the vehicle to be Milton Ford and the passenger was identified as the defendant Leroy Poindexter. Officer T. E. Oliver of the Department of Public Safety in Durham, N.C. advised Mr. Ford that he was under arrest for possession of a stolen vehicle and both Poindexter and Ford were placed under arrest for possession of a stolen vehicle. Mr. Poindexter was also placed under arrest and the officers then searched this vehicle at the place where it was stopped and Officer Oliver found in the trunk of the vehicle clothing and a sawed-off J. C. Higgins 12-gauge semi-automatic shotgun which was concealed in the pants leg of a pair of blue jeans and a silver colored toy pistol. Mr. Ford was searched after he was placed under arrest and the sum of \$150 was found on his person and seized by Officer Kusz.

The defendant Ford presented evidence that he had borrowed the car from a friend and paid \$35 to this unnamed person in order to transport clothing to Durham. The only clothing found in this vehicle was in the trunk and consisted of clothing, toiletries and necessities which, according to the defendant Ford, belonged to him.

Defendant failed to except to any of these findings of fact. Therefore, the question of whether there is sufficient evidence to support these findings is not before us, *State v. Cheek*, 307 N.C. 552, 299 S.E. 2d 633 (1983); *State v. Mackey*, 56 N.C. App. 468, 291 S.E. 2d 663 (1982); *Employers Insurance v. Hall*, 49 N.C. App. 179, 270 S.E. 2d 617 (1980), *cert. denied*, 301 N.C. 720, 276 S.E. 2d 283 (1981). We believe, consistent with the trial court's conclusion, that these facts support a determination that the officers had probable cause to believe that contraband was located in the vehicle. The search was therefore legal and the assignments of error are overruled.

[2] Defendant next contends the court erred in denying his motion to suppress the out-of-court and the in-court identification of the defendant because the photographic identification procedure was impermissibly suggestive. Defendant also argues that the court's findings of fact are not supported by clear, competent and convincing evidence and that furthermore, the conclusions of law are not supported by the findings.

State v. Ford

Defendant has again failed to object to any of the findings of fact; therefore, the question of whether there is evidence to support the findings of fact is not before us. *State v. Cheek, supra*; *State v. Mackey, supra*, and *Employers Insurance v. Hall, supra*. The court made the following findings of fact in its order denying the motion to suppress the identifications:

On or about the 21st day of June, 1982 at approximately midnight, two black males entered a business known as Joe's Shopwell, on South Mebane Street in Burlington, N.C. and with the use of a sawed-off shotgun took from Harvey Burnette, the attendant, cash belonging to Joe Shopwell. One black male was described as wearing an orange T-shirt and another was wearing a light colored shirt and bow tie. The black male wearing the light shirt and bow tie had the shotgun and was standing approximately 12 inches from Mr. Burnette and on the other side of the counter. The black male wearing the orange T-shirt came around the counter and at one point was standing close enough to Mr. Burnette that Mr. Burnette could have reached out and touched him. The store was open and lit by several rows of fluorescent lights and neither black male was wearing a mask. Mr. Burnette was in their presence from some two to three minutes and had an opportunity to observe the faces and clothing of the two black males.

Gregory Lewis Saunders was also working at Joe's Shopwell on this occasion and had gone outside the store to check on some cars and there encountered a black male with whom he conversed for three to four minutes about the directions to a house. That Mr. Saunders and this black male were standing in the parking lot at Joe's Shopwell which was lighted by the store lights inside, street lights and a store sign. Mr. Saunders was able to observe the face of this black male. This same black male drew a pistol from under his clothing and threatened Mr. Saunders who fled and as he fled observed another black male in the parking lot and observed the face and clothing of this individual.

At approximately 8:00 a.m. on the 21st day of June, 1982, Mr. Burnette was shown two sets of photos, each set containing five to seven photographs of black males appearing to be

State v. Ford

of the same age. These pictures were laid out before Mr. Burnette by Det. G. W. Barrow of the Burlington Police Department. Mr. Burnette was asked to look at the photographs and if he saw a picture of the men who robbed him to point them out. He was not told that a suspect was in custody or that a photo of the suspect was being shown to him. Mr. Burnette picked the defendant Ford's picture from one set of photographs and the defendant Poindexter from the second set of photographs. In the photographs Mr. Ford was wearing an orange T-shirt and Mr. Poindexter was wearing a light-colored shirt and bow tie. At the time Officer Barrow selected the photographs for the photographic lineup, he was not aware that the description of the suspects included an orange T-shirt and a light-colored shirt and bow tie. Mr. Saunders was shown the same two sets of photographs at a later time and not in the presence of Mr. Burnette. Mr. Saunders was shown these photographs by Officer Barrow who laid each set down individually, as he had done with Mr. Burnette and asked Mr. Saunders to observe the photographs and if he saw one of the persons who had robbed the store to point him out. Mr. Saunders selected the photograph of Mr. Ford from the first set of photographs. He was then shown a second set of photographs and was instructed to look at the photographs and if he observed the other person who had robbed the store to point him out. Mr. Saunders selected a photograph of Mr. Poindexter as being the other subject outside of the business just before the robbery. Both Mr. Burnette and Mr. Saunders testified that their in-court identification of Mr. Ford and Mr. Poindexter was based on having observed Mr. Ford and Mr. Poindexter at the time of the robbery.

The Court observed the witnesses Burnette and Saunders and heard their testimony thereby forming an opinion that they were credible witnesses; that both Burnette and Saunders are black.

Based upon these findings the court concluded that the out-of-court procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. Five factors to be considered when determining whether an out-of-court procedure was impermissibly suggestive are: (1) The opportunity of

State v. Ford

the witness to view the criminal, (2) the witness's degree of attentiveness, (3) the accuracy of the witness's principal description, (4) the level of certainty at confrontation, and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188 (1972); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983). In the case at bar, the following facts are clear: The witness had ample opportunity to observe the robbers at close range in a well-lighted store. The witnesses were able to identify defendant from the photographic lineup without any hesitation. The identification occurred only a few hours following the robbery. The individuals selected resembled the witnesses' initial description of the robber. Given these factors, we find that the trial court's conclusion that the out-of-court procedure was not unreasonably suggestive must be affirmed. The assignments of error are overruled.

[3] Next defendant argues the court erred by allowing the state's motion to join his case with that of his co-defendant. N.C. Gen. Stat. § 15A-926(b)(2) (1975) provides for the joinder of defendants upon written motion. No written motion was filed in this case; however, since the motion to join these defendants for trial was made at trial we hold that the motion was proper pursuant to the provisions of N.C. Gen. Stat. § 15A-951 (1975). See *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). Assuming *arguendo* that the court improperly allowed the motion we find no prejudicial error since both defendants were charged with jointly perpetrating the robbery and both offered the same alibi defenses at trial. The assignment of error is overruled.

[4] Finally, defendant contends the court erred by denying his motion to dismiss the charges at the close of the state's evidence and again at the close of all the evidence. Defendant argues that the state failed to prove that he endangered or threatened the storekeeper's life. Defendant further argues that there is no evidence from which the jury could find that Mr. Burnette even felt threatened by defendant. We find defendant's argument to be totally without merit. It is inconceivable to think that someone faced with two robbers one of which was holding a sawed-off shotgun less than a foot from his body would not feel threatened. Defendant's assignment of error is totally without merit and therefore overruled.

Campbell v. City of Greensboro

Defendant had a fair trial free from prejudicial error.

No error.

Chief Judge VAUGHN and Judge HEDRICK concur.

GEORGE B. CAMPBELL, KATHLEEN H. CAMPBELL, JULIAN C. WINTHROP, MARGARET D. WINTHROP, CLAUDE A. MANZI, JACQUELINE R. MANZI, BETTY G. HINSON, JACKSON O. HINSON, JR., HAROLD R. MOAG, JR., ANN BURTON MOAG, BETTY ADAMS SMITH, JOHN WESLEY SMITH, II, HENRY CLYDE WALTERS, ALBERTA M. WALTERS, JETER L. WILLIAMSON, JR., ALMA C. WILLIAMSON, BOBBY THOMAS WILSON, SHIRLEY TATE WILSON, SUING ON THEIR OWN BEHALF AND ON BEHALF OF OTHERS SIMILARLY SITUATED v. THE CITY OF GREENSBORO

No. 8318SC882

(Filed 4 September 1984)

1. Municipal Corporations § 2— annexation statutes—constitutionality

Statutes setting out the involuntary annexation procedure applicable to cities of 5,000 or more do not violate equal protection or Art. II, § 24 of the N.C. Constitution because certain counties are exempted therefrom.

2. Municipal Corporations § 2.3— annexation—following natural topographic features

Although the boundary lines of areas being annexed did not follow natural topographic features for about a fourth of their total distance, the trial court properly concluded that the city complied with G.S. 160A-48(e) where the court found upon supporting evidence that in those instances where natural topographic features were not followed, practical reasons existed for not doing so.

3. Municipal Corporations § 2.4; Rules of Civil Procedure § 26— discovery procedures—applicability to annexation proceeding

The discovery provisions of G.S. 1A-1, Rule 26(b)(1) applied to judicial proceedings for the review of annexation ordinances with regard to whether the city followed the statutory procedure, whether the city's plan met statutory requirements, and whether the area to be annexed was eligible for annexation. The trial court in this proceeding did not err in entering a protective order preventing petitioners from deposing the City Manager and from examining most of the documents petitioners requested where such testimony and documents were not relevant to the issues the trial court had to decide.

Campbell v. City of Greensboro

APPEAL by petitioners from *Seay, Judge*. Judgment entered 23 March 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 May 1984.

This case concerns the attempted annexation of three different territories adjacent to the City of Greensboro. Each of the petitioners lives in one of the areas to be annexed. The annexation is being processed under the provisions of Part 3 of Article 4A of Chapter 160A of the General Statutes, which by its terms applies to annexations by cities of 5,000 or more population. In suing to enjoin the City from completing the annexation petitioners alleged, among other things, that because G.S. 160A-56 made Part 3 of Article 4A inapplicable to certain other counties having towns with 5,000 or more population, the annexation statute is unconstitutional, and that in establishing the boundaries of the areas to be annexed the City failed to follow various natural topographical lines, as the statute requires.

In undertaking to prepare their case, petitioners requested the City to produce certain documents relating to its compliance with the statutory annexation procedures and attempted to take the deposition of the City Manager. Respondent moved for a protective order, contending the annexation act does not authorize such discovery. After a hearing, Judge Helms ordered that the City Manager not be deposed and required the City to produce only some of the documents requested. Petitioners' immediate appeal from the order was dismissed by this Court as interlocutory and premature, and their request for discretionary review by the North Carolina Supreme Court was denied.

At the hearing in the Superior Court on the merits of the petition, petitioners presented evidence tending to show that: In setting the boundaries of the areas to be annexed, the City had failed to follow certain natural topographic lines, without good reason; the petitioners would be damaged in various respects if the annexation were approved; the Legislature exempted certain counties from the annexation plan for cities with a population of 5,000 or more just because their representatives so requested; and the annexation would affect certain township lines in different ways. The City's evidence tended to show that: It has complied with the applicable annexation statutes; it can furnish the annexed areas the same services other parts of the City receive;

Campbell v. City of Greensboro

and in establishing boundary lines of the areas to be annexed, it was not practical to follow topographic lines in many instances.

Following the hearing Judge Seay entered a judgment in which it was found and concluded that the statutes proceeded under are constitutional, the City has substantially complied with them in all material respects, and its annexation ordinance is valid.

Foster, Conner & Robson, by Eric C. Rowe and C. Allen Foster, for petitioner appellants.

Dale Shepherd and Linda A. Miles, Deputy City Attorneys, for respondent appellee.

PHILLIPS, Judge.

Four questions are presented by this appeal. Two are constitutional questions, which we will address first, since they have already been answered by our Supreme Court and this Court.

[1] The basis for both questions is that the statutory annexation plan petitioners are subjected to in this proceeding, Part 3 of Article 4A of Chapter 160A of the General Statutes, does not apply to certain other counties having towns of more than 5,000 population. Petitioners' first contention in this regard is that the statutory scheme imposed on them as residents of Guilford County, but not on residents of certain other counties similarly situated, denies them equal protection of the law under both the federal and state constitutions. This contention is overruled under authority of *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980) and *Abbott v. Town of Highlands*, 52 N.C. App. 69, 277 S.E. 2d 820 (1981). Petitioners' second contention is that since the statute involved applies only to some counties, but not others, it violates Article II, Section 24 of the North Carolina Constitution, which prohibits the General Assembly from enacting "any local, private, or special act or resolution" in regard to certain enumerated subjects. But it has long been settled that this constitutional provision does not apply to annexation proceedings by municipalities. The reason for this, as is made plain by *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961) and *In the Matter of City of Durham Annexation Ordinance*, 69 N.C. App. 77, 316 S.E. 2d 649 (1984), is that another constitutional pro-

Campbell v. City of Greensboro

vision, Article VII, Section 1 (formerly Article VIII, Section 4) authorizes the General Assembly "except as otherwise prohibited by this Constitution" to "give such powers and duties to counties, cities, and towns and other governmental subdivisions as it may deem advisable," and no other provision of our Constitution prohibits the General Assembly from enacting special legislation for the annexation of areas by municipalities. *See also Lutterloh v. Fayetteville*, 149 N.C. 65, 62 S.E. 758 (1908); *Manly v. Raleigh*, 57 N.C. 370 (1859).

[2] The next question presented is whether the trial court erred in finding and concluding that in setting the boundaries of the areas to be annexed, the City substantially complied with the statute pertaining thereto. The text of G.S. 160A-48(e) relevant to this assignment of error reads as follows:

In fixing new municipal boundaries, a municipal governing board shall, wherever *practical*, use natural topographic features such as ridge lines and streams and creeks as boundaries, and if a street is used as a boundary, include within the municipality land on both sides of the street and such outside boundary may not extend more than 200 feet beyond the right-of-way of the street. (Emphasis supplied.)

That the boundary lines of the areas being annexed do not follow natural topographic features for about a fourth of their total distance is not disputed. The court found and the evidence shows that the boundaries follow natural topographic features for a distance of 90,800 feet altogether, but do not follow such features a total distance of 31,900 feet. The court also found as a fact, however, that the City followed natural topographic features when it was practical to do so and that in those instances where natural topographic features were not followed practical reasons existed for not doing so. This finding is clearly sufficient to support the court's conclusion that the new boundary lines were laid out in compliance with the applicable statute; and if the finding is supported by competent evidence, it concludes the matter, since questions of fact in proceedings of this kind are the province of the trial court. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980). The finding is supported by much competent evidence. The testimony of respondent's chief witness, its Assistant Public Works Director, was largely devoted to explain-

Campbell v. City of Greensboro

ing why it was not practical to follow natural topographic features at the different points involved. The testimony indicates that the witness had been the City's Chief Engineer for 25 years, was familiar with each area to be annexed, understood the engineering and other problems each involved, and was well qualified to testify as to the practicality or impracticality of following natural topographic features at different places in laying out the new boundary lines. This issue of fact having been resolved against petitioners upon competent evidence, this assignment of error is also overruled.

[3] The final question presented is whether the order preventing petitioners from deposing the City Manager and examining most of the documents petitioners requested respondent to produce was properly entered. Petitioners contend that though their attempted discovery covered a very wide scope indeed, they were entitled to pursue it under the provisions of Rule 26(b)(1) of the N.C. Rules of Civil Procedure, which authorizes parties in civil proceedings to "obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action." Respondent, on the other hand, contends petitioners were entitled to no discovery at all, since this is but a judicial review of some city ordinances, rather than an ordinary lawsuit; and respondent's motion for a protective order was not based on the "good cause" provisions of Rule 26(c), but on the court's inherent power to keep litigation being processed in proper channels. In ruling on respondent's motion, however, and entering the protective order which permitted petitioners to do some of discovery, but prevented them from doing the rest, the trial judge expressly relied upon Rule 26(c). In doing so, the judge was apparently of the opinion that though discovery in annexation proceedings is not altogether forbidden, its scope is necessarily limited by the nature of the proceeding. We agree.

Though, so far as our research discloses, neither our Supreme Court nor this Court has determined whether the rules of civil procedure even apply to the judicial review of annexation ordinances, we believe that the answer is quite clear. G.S. 1A-1, Rule 1 provides that the rules "shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." Since this is manifestly a

Campbell v. City of Greensboro

"proceeding of a civil nature," the rules clearly apply to it, we believe, unless a different procedure is provided by statute, but only to the extent necessary to process the proceeding according to its nature. A different procedure for this proceeding from that provided in the rules of civil procedure is provided to some extent by G.S. 160A-50. Subsection (c) requires the City to transmit to the reviewing court a transcript of the journal or minute book in which the procedure for annexation has been set forth and a copy of the report containing the plan for extending services to the annexed area as required by G.S. 160A-47. Subsection (f) permits the reviewing court to hear evidence, but only with regard to the statutory procedure not being followed, the City's plan not meeting the requisites set forth in G.S. 160A-47, and the area to be annexed not having the proper characteristics for annexation as set forth in G.S. 160A-48. And subsection (g) limits the reviewing court's consideration to whether the procedures and plans required by law have been followed and adopted and whether the area involved is one that the law approves for annexation.

Thus, this proceeding is a limited judicial review, with few similarities to ordinary civil actions which are initiated, tried and adjudicated in a different manner and for which the rules of civil procedure were mostly devised. Nevertheless, since the court reviewing annexation proceedings is explicitly authorized to receive evidence as to the City's compliance with the various procedures prescribed, as to its annexation plan meeting the requisites of G.S. 160A-47, and as to the area involved being eligible for annexation under G.S. 160A-48, it seems plain to us that in those instances where discovery may illuminate these issues that it is authorized under the rules of civil procedure. In the absence of an explicit statutory restriction to the contrary, it necessarily follows, it seems to us, that a judge having the duty to receive evidence on and decide certain issues has the power, within his discretion, to require that evidence on those issues be produced. In the exercise of that power other factors require consideration, however, including the information already available through the documents required by G.S. 160A-50(c) and the mandate contained in G.S. 160A-50 that these reviews be accomplished expeditiously and without unnecessary delays.

The record indicates that Judge Helms exercised sound judicial discretion in ruling on respondent's motion for a protec-

Superior Tile v. Rickey Office Equipment

tive order. The documents that he required the City to produce were clearly relevant to the issues he was obliged to decide. Many of the documents that he refused to permit petitioners to examine—including documents relating to projected revenues from the annexed area, to the impact of annexation on future city budgets, to the reasons or purposes underlying the proposed annexation, and to the inclusion or exclusion of particular tracts in the annexation—were clearly irrelevant in that they related to the wisdom or politics of the plan, rather than its compliance with the law. And though some of the other documents petitioners sought appear to be more or less relevant to the issues before the court, we cannot say that refusing their discovery was an abuse of discretion or that petitioners were prejudiced thereby. And nothing in the record suggests that the City Manager's testimony would have shed any light on the technical issues that the court had to decide. This assignment of error is also overruled, and the judgment appealed from is affirmed.

Affirmed.

Judges HEDRICK and ARNOLD concur.

SUPERIOR TILE, MARBLE, TERRAZZO CORPORATION D/B/A SUPERIOR SALES CO. v. RICKEY OFFICE EQUIPMENT, INC., A CORPORATION AND KERMIT R. RICKEY AND WIFE, MARY P. RICKEY

No. 8326SC1021

(Filed 4 September 1984)

1. Negligence § 50.1— negligence by plumbers—no liability by landowners

In an action to recover for damages to plaintiff's personal property when a water pipe on defendant's property burst, the trial court properly refused to give plaintiff's requested instruction which would have made defendants liable for the negligence of plumbers in failing to discover the disrepair of the pipes even though defendants had used due care in hiring them.

2. Negligence § 27.3— matter of checking for leaks—causes of leaks—testimony not error

In an action to recover for damages to plaintiff's personal property when a water pipe on defendants' property burst, a plumber's testimony on cross-examination that in checking for leaks a plumber does not dig up pipes and ex-

Superior Tile v. Rickey Office Equipment

amine them and his testimony as to the various causes of leaks did not constitute prejudicial error.

3. Evidence § 25— comparison of photographs—expert testimony not required

It is not necessary for a witness to qualify as an expert in comparing photographs in order to testify that he believes separate photographs depict the same subject and to point out to the jury why he so believes.

4. Witnesses § 7— past recollection recorded—deposition inadmissible

A deposition was not admissible as past recollection recorded where the witness did not authenticate the deposition by saying that it represented his recollection at the time it was made.

5. Evidence § 33.2— testimony inadmissible as hearsay

Testimony by a witness that another person had told one of the individual defendants that certain pipes were rotten was hearsay and inadmissible as substantive evidence.

6. Pleadings § 33— denial of amendment to conform to evidence—absence of prejudice

Plaintiff was not prejudiced by the trial court's denial of its motion to amend the complaint to conform to the evidence where plaintiff had the benefit in the charge of all it was entitled to have if the motion to amend the complaint had been allowed.

APPEAL by plaintiff from *Griffin, Judge*. Judgment entered 7 February 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 June 1984.

The plaintiff appeals from a judgment entered after a jury verdict. The plaintiff alleged that it suffered substantial damage to its personal property from flooding as a result of the negligence of the defendants. It alleged as specific acts of negligence (1) that the defendants failed to make proper repairs to deteriorated pipes in their water supply system although they knew or should have known of its deteriorated and eminently dangerous condition; (2) that they failed to warn the plaintiff of the deteriorated water supply system; and (3) that they failed to take due care to prevent flooding by the water supply system.

The plaintiff's evidence showed it owned personal property of substantial value which was stored in a building on South Tryon Street in Charlotte. The defendants owned and controlled a building on the adjoining lot. On 15 May 1979 a pipe burst on the defendants' property and water from the pipe flooded the plaintiff's building causing substantial damage to the personal proper-

Superior Tile v. Rickey Office Equipment

ty of the plaintiff. On 17 November 1979 another pipe on the defendants' property burst, again flooding the plaintiff's building and causing substantial damage to its personal property. J. V. Andrews Company, a plumbing contractor, had inspected the plumbing in the defendants' building and done work on the plumbing at times before the flooding in May 1979. This company was called when the first flooding occurred. Its employees found a cast iron pipe was severely eroded and had sprung a leak which resulted in flooding the plaintiff's property.

In the late summer or fall of 1979, the defendants were preparing the upstairs portion of their building for rent to the census bureau. They hired Brown and Glenn to work on the upstairs plumbing to bring it up to standard for the census bureau. They also hired Andrews to tie in a new water pipe distribution system for the upstairs portion of the building. There were four water meters and four lines leading into the Rickey Building. The water supply main and the meter leading to the upstairs portion of the building had been cut off for several years. The plaintiff offered evidence which it contends shows the plumbers hired by the defendants were negligent and this caused the flooding and damage to its property. The court submitted issues as to the negligence of the defendants in regard to both floodings. The jury answered both issues for the defendants. The plaintiff appealed from a judgment entered on the verdict.

Boyle, Alexander, Hord and Smith, by Norman A. Smith, for plaintiff appellant.

Jones, Hewson and Woolard, by Harry C. Hewson and Hunter M. Jones, for defendant appellees.

WEBB, Judge.

[1] The plaintiff's first assignment of error is to the charge. The plaintiff requested the court to instruct the jury that if the exercise of reasonable care by the defendants or any person to whom they entrusted the maintenance and repair of the water system for the building would have disclosed the disrepair of the pipes, the defendants would be liable for the damage to the plaintiff's property for turning on the water without making this repair. The court charged only as to the defendants' duty of due care as to the pipes and the plaintiff argues this was error. The charge

Superior Tile v. Rickey Office Equipment

requested by the plaintiff would make the defendants liable for the negligence of the plumbers although the defendants had used due care in hiring them. The plaintiff relies on Restatement (Second) of Torts § 365 (1965) which says:

"A possessor of land is subject to liability to others outside the land for physical harm caused by the disrepair of a structure or other artificial condition thereon, if the exercise of reasonable care by the possessor or by any person to whom he entrusts the maintenance and repair thereof

(a) would have disclosed the disrepair and the unreasonable risk involved therein, and

(b) would have made it reasonably safe by repair or otherwise."

The rationale of making one person liable to another for tort damages under our system is based on the fault of the defendants. It may be that this section of the Restatement should be adopted as the law of this state in some cases. In this case we do not believe the defendants should be held liable when there is no evidence they were negligent or otherwise at fault in hiring the plumbers to turn on the water system. *See Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

We note that Section 365 may not be intended to apply to this case. Section 364 which deals with the liability of possessors of land in circumstances other than those covered by Section 365 uses the words "physical harm" as does Section 365. The comment to Section 364 says it means "physical harm of persons" which we interpret to mean personal injury. We believe the words were intended to have the same meaning in both sections. There is no personal injury in this case. The plaintiff's first assignment of error is overruled.

[2] The plaintiff next assigns error to the admission of certain testimony. James V. Andrews, the president of one of the plumbing companies that did work for the defendants, was the first witness for the plaintiff. He testified as to how a plumber would check for leaks. He was allowed to testify on cross-examination over the objection of the plaintiff that in checking for leaks a plumber does not dig up pipes and examine them. He was also allowed to testify over objection as to various causes of leaks in

Superior Tile v. Rickey Office Equipment

pipes. The plaintiff contends it was prejudicial error to allow this testimony because it is not related to any matter relevant to the issues. *See* 1 Brandis on N.C. Evidence § 35 (1982). The plaintiff contends it was never its contention that the defendants should dig up the pipes to test them and the testimony should have been excluded. At the time Mr. Andrews testified all the plaintiff's contentions as to negligence of the defendants were not clear. We do not believe this testimony of Mr. Andrews was so far from any matter relevant to the issue as to constitute prejudicial error.

The plaintiff also contends it was error to let Mr. Andrews testify that it was his understanding that the wall of the Rickey Building coincided with the property line. The plaintiff argues that this allowed Mr. Andrews to express an opinion on a matter of survey without showing that he was an expert. The plaintiff argues that the jury could have been led to believe from this that the corrosion of the pipes occurred off the property of the defendants and they were not responsible for it. The defendants admitted they were responsible for the repair of all pipes leading from the city's water meter to their building, regardless of whose property they were on. We do not believe plaintiff was prejudiced by this testimony.

[3] The plaintiff introduced photographs of some items of property which were damaged by the water. Mike Caldwell, a professional photographer, testified that he made some pictures of the property for the defendants, which pictures were placed in evidence. He was then allowed to testify over plaintiff's objection that some of the pictures he made were of the same things that were in the pictures introduced by the plaintiff. He then pointed out to the jury the markings on the items which led him to so believe. The pictures were passed among the jury for their examination. The plaintiff argues that there was no showing that Mr. Caldwell was an expert in comparing photographs. We do not believe it is necessary for a witness to qualify as an expert in comparing photographs to testify that he believes separate photographs depict the same subject and point out to the jury why he so believes. The jury can determine for themselves if he is correct. If it was error to admit this testimony, the testimony went to the damage issues which issues the jury did not reach. We do not believe the testimony was prejudicial to the plaintiff.

Superior Tile v. Rickey Office Equipment

There was also testimony by the defendant Kermit P. Rickey which went to the damage issues. The appellant asks that in the event of a new trial that this evidence be excluded. In light of the result we reach we do not consider this part of the assignment of error.

[4] Michael Keesler, an employee of Andrews, was called as a witness by the plaintiff. He was asked if he remembered a conversation with Johnny Major and Mr. Rickey about the water being cut on or off and he said he did not. Mr. Keesler testified "I remember something being said about it, but I don't remember what was said or anything like that." The plaintiff then offered into evidence a deposition of Mr. Keesler taken before trial in which he testified that in a conversation with Johnny Major and Mr. Rickey he learned the maintenance man for the defendants had turned on the water. The court would not allow this part of the deposition to be read to the jury. The plaintiff contends it should have been admitted as past recollection recorded. A recorded past recollection is admissible in evidence if a witness testifies that he cannot now testify from present recollection but the recorded recollection was made when the facts were fresh in his memory and it actually represented his recollection at the time. *See* 1 Brandis on N.C. Evidence § 33 (1982). In this case the witness did not authenticate the deposition by saying it represented his recollection at the time it was made. It was not admissible as a recorded past recollection.

[5] Joseph Barkley testified for the plaintiff. The court excluded testimony by Joseph Barkley that Michael Keesler had told Mr. Barkley that he had told either Mr. or Mrs. Rickey that the pipes were rotten. Mr. Keesler in his testimony denied making such a statement. The testimony offered by Mr. Barkley was to prove by a statement to him from Mr. Keesler at least one of the Richeys was told by Mr. Keesler that the pipes were rotten. The probative force of this testimony depends on the credibility of Mr. Keesler who was not testifying. It was hearsay testimony. *See* 1 Brandis on N.C. Evidence § 138 (1982). Mr. Barkley's testimony may have been admissible as a prior inconsistent statement to impeach the testimony of Mr. Keesler. *See* Brandis *supra* § 46. It was not admissible as substantive evidence and its exclusion is not prejudicial error.

Smith-Douglass v. Kornegay; First-Citizens Bank v. Kornegay

[6] The plaintiff assigns error to the denial of a motion to amend its complaint made at the end of the trial. The plaintiff moved to amend the complaint to conform to the evidence by alleging as acts of negligence that the defendants reactivated the water system without properly inspecting the water lines or having it properly inspected by a plumber at a time when they knew or should have known a similar pipe had failed because of corrosion approximately six months earlier. Although the court did not allow the amendment it charged the jury that it could find the defendants negligent if it found any of these things to be facts except the requirement that the water lines be properly inspected by a plumber. The plaintiff had the benefit in the charge of all it was entitled to have if the motion to amend the complaint had been allowed.

No error.

Judges JOHNSON and PHILLIPS concur.

SMITH-DOUGLASS, DIVISION OF BORDEN CHEMICAL, BORDEN, INC. v. ELLIS GERALD KORNEGAY, CONNIE M. KORNEGAY, KELVIN LYNDELL KORNEGAY, CECIL E. KORNEGAY, AND JEAN H. KORNEGAY

FIRST-CITIZENS BANK & TRUST COMPANY v. ELLIS GERALD KORNEGAY, CONNIE M. KORNEGAY, KELVIN LYNDELL KORNEGAY, CECIL E. KORNEGAY, AND JEAN H. KORNEGAY

No. 834SC1039

(Filed 4 September 1984)

Fraudulent Conveyances § 3.4— adequate consideration for conveyances—genuine issue of material fact

In an action by creditors to set aside conveyances as fraudulent, the evidence presented genuine issues of material fact as to whether the conveyances were supported by adequate consideration where there was evidence that two tracts were conveyed to the male debtor's parents in satisfaction of a debt to the parents of \$73,000 and that the parents assumed obligations on the tracts of \$97,000, and where another tract was transferred to the male debtor's brother for \$2,000 and the evidence as to whether the fair market value of the tract was more than that amount was conflicting.

Smith-Douglass v. Kornegay; First-Citizens Bank v. Kornegay

APPEAL by defendants from *Llewellyn, Judge*. Judgment entered 19 August 1983 in Superior Court, DUPLIN County. Heard in the Court of Appeals 8 June 1984.

George R. Kornegay, Jr., P.A., by Janice S. Head and George R. Kornegay, Jr., for defendant appellants.

Ward and Smith, P.A., by Michael P. Flanagan, for plaintiff appellee, First-Citizens Bank & Trust Company.

BECTON, Judge.

This appeal presents one narrow question, whether the trial court properly granted summary judgment to creditors seeking to have a transfer of real estate declared void. We find a material issue of fact as to adequacy of consideration, and we, therefore, reverse.

I

At the time these events occurred, the Kornegay defendants were farmers, with two main farming operations. One farming operation belonged to Ellis Gerald Kornegay (Gerald Kornegay) and his wife, Connie, and the other belonged to Gerald's father, Cecil Kornegay, and his wife Jean. Kelvin Kornegay, Gerald Kornegay's brother, had recently graduated from high school and lived with his father. Smith-Douglass, Inc. (SDI), a fertilizer supplier, and First-Citizens Bank & Trust Company (FCBT), held notes totalling \$124,000 from Gerald Kornegay for moneys advanced for farm supplies and operating costs.

On 7 March 1982 Gerald and Connie Kornegay transferred three parcels of land to members of their family: a 100-acre tract and a two-acre tract to Cecil and Jean Kornegay, and an 11-acre tract to Kelvin Kornegay. Gerald Kornegay thereafter defaulted on the SDI and FCBT notes. The two creditors brought actions, later consolidated, on the notes themselves and also to void the transfers as fraudulent. On the creditors' motion for summary judgment, supported by the depositions of all five Kornegays, the trial court rendered judgment on the notes and declared the transfers void. From this ruling, the Kornegays appeal.

Smith-Douglass v. Kornegay; First-Citizens Bank v. Kornegay

II

The Kornegays do not contest, in either their assignments of error or their brief, the grant of summary judgment on the notes. Therefore the propriety of that portion of the court's order is not challenged by this appeal, and we accordingly affirm it. 4A N.C. Gen. Stat. App. I 2(A), N.C. R. App. P. 10(a), 28(a) (Supp. 1983); *State v. Brothers*, 33 N.C. App. 233, 234 S.E. 2d 652, *disc. rev. denied*, 293 N.C. 160, 236 S.E. 2d 704 (1977). Only the portion granting summary judgment on the conveyances claim remains.

III

Summary judgment is proper only when the forecast of evidence shows that no genuine issue exists as to any material fact and that the movant is entitled to judgment as a matter of law. *Sharpe v. Quality Education, Inc.*, 59 N.C. App. 304, 296 S.E. 2d 661 (1982). The court must look at the record in the light most favorable to the non-movant in evaluating the evidence. *Id.* When a question of material fact exists on the record so viewed, the movant has no right to summary judgment, and a summary judgment order will be reversed. *Liberty Loan Corp. v. Miller*, 15 N.C. App. 745, 190 S.E. 2d 672 (1972).

IV

The pivotal question is whether there was sufficient consideration for the three transfers. If no sufficient consideration changed hands, then the conveyances were voluntary and void, since Gerald Kornegay admitted that he did not retain sufficient property to satisfy his debts. N.C. Gen. Stat. § 39-17 (1976). No question of fraud would then need to go to the jury, *Black v. Sanders*, 46 N.C. (1 Jones) 67 (1853), and summary judgment would therefore be appropriate. If, on the other hand, consideration did pass, the intent of the parties to the transactions becomes an essential element of the creditors' action. N.C. Gen. Stat. § 39-15 (1976); *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914); *Moore v. Hinnant*, 89 N.C. 455 (1883). Questions of fraudulent intent ordinarily go to the jury on circumstantial evidence, and summary judgment is usually inappropriate. *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The evidence in the record as to the state of mind of Gerald Kornegay does not compel a conclusion as a matter of law that he

Smith-Douglass v. Kornegay; First-Citizens Bank v. Kornegay

transferred the property with intent to defraud. Therefore, unless the plaintiffs' evidence established as a matter of law that no consideration passed, the trial court erred in granting summary judgment to FCBT and SDI.

V

What constitutes valuable consideration under G.S. § 39-15 (1976) was explained by our Supreme Court in *North Carolina Nat'l Bank v. Evans*, 296 N.C. 374, 250 S.E. 2d 231 (1979). The *Evans* court clearly distinguished consideration under the law of fraudulent conveyances from that under the law of contracts as follows:

This crucial distinction was explained by Chief Justice Ruffin in *Fullenwider v. Roberts*, 20 N.C. 420 (1839). Mere inadequacy of price is not sufficient to set aside a contract as between two parties for the reason that 'if one will, without imposition, distress or undue advantage, make a bad bargain with his eyes open, *he* must stand to it. His agreement is sufficient, because his interests alone are affected by it.' *Id.* However, different policy considerations come into play when the transaction involves the interests of a creditor who is not a party to the transaction. As against such creditors 'the price must be sufficient in itself to sustain the deed, without the aid of their acceptance, for no such acceptance exists.' *Id.* Since the creditor has no control over the amount of consideration which his debtor will accept in relinquishing assets, the law requires that the debtor receive 'a *fair and reasonable* price, according to the common mode of dealing between buyers and sellers.' *Id.* This does not mean that the debtor 'should [be] paid every dollar the land was worth, but he should [be] paid a reasonably fair price—such as would indicate fair dealing, and not be suggestive of fraud.' *Austin v. Staten*, 126 N.C. 783, 36 S.E. 338 (1900). Such a requirement prevents a debtor from placing his assets beyond the reach of his creditors by transfers to friendly parties for nominal considerations.

296 N.C. at 378-79, 250 S.E. 2d at 234. The resolution of the issue on appeal depends on the strength of the evidence that Gerald and Connie Kornegay did not receive a "fair and reasonable" price for the tracts in question.

Smith-Douglass v. Kornegay; First-Citizens Bank v. Kornegay

VI

The trial court had before it evidence that Gerald Kornegay's parents had loaned him approximately \$73,000 and that the transfer of the real property satisfied that debt. The parents, Cecil and Jean Kornegay, claimed to take title in exchange for forgiveness of this existing debt. The majority of jurisdictions accept such satisfaction of debt as consideration if the amount forgiven is fairly equivalent to the value of the property. 37 Am. Jur. 2d *Fraudulent Conveyances* § 21, at 712 (1968). North Carolina has recognized a conveyance for the sole purpose of discharging an honest debt as outside the statutory prohibition against fraudulent conveyances. *Hafner v. Irwin*, 23 N.C. (1 Ired.) 490 (1841). In *Wurlitzer Distributing Corp. v. Schofield*, 44 N.C. App. 520, 261 S.E. 2d 688 (1980), this Court considered the application of *Hafner*, and concluded that *Hafner* controlled when it had been established that the existing debts were valid. The creditors have not shown that the existing debt was invalid as a matter of law; the kind of "after the fact" invention found in *Wurlitzer* is not conclusively apparent on this record. The creditors emphasize the absence of revenue stamps on the deeds as proof of no real consideration; however, under current law this is only evidence of lack of consideration, not conclusive proof. See N.C. Gen. Stat. § 105-228.32 (1979); 40 N.C. Att'y Gen. Rep. 876 (1970) (duty of presenter, not Register of Deeds, to ensure proper amount of stamps affixed). The creditors also contend that the debt to Gerald Kornegay's father Cecil consisted of obligations on joint purchases and that the purchases were for the benefit of Cecil Kornegay, and therefore no consideration passed by the forgiveness. The record does not conclusively establish that all the purchases were joint in nature; in fact, there was substantial testimony by Cecil and Jean Kornegay that they lent money to pay bills incurred solely by Gerald. Nothing in the record suggests that the creditors attempted to discover the financial records of the Kornegays, or to force them to admit that there were no such records. Compare *Wurlitzer v. Schofield* (no records or notes or demand for payment). On this record we conclude that there was a genuine issue of fact as to the existence of consideration by virtue of satisfaction of debt.

In addition, there was evidence that Cecil and Jean Kornegay assumed the remaining purchase obligations on the tracts they re-

Smith-Douglass v. Kornegay; First-Citizens Bank v. Kornegay

ceived. Assumption of the remainder of existing mortgage debts can also constitute sufficient consideration. *NCNB v. Evans*; see also 37 Am. Jur. 2d *Fraudulent Conveyances* § 22, at 712-13 (1968).

Whether these two types of consideration, taken together, constituted a "fair and reasonable" price also appears to present a genuine issue of fact. The amount of debt satisfied and assumed by Cecil and Jean Kornegay, apparently some \$170,000,¹ does not appear to be so unreasonably disproportionate to the asserted fair market value of the property as to conclusively indicate fraud. See 37 Am. Jur. 2d *Fraudulent Conveyances* §§ 20-21, at 710-12 (1968). Accordingly, we conclude that there was a genuine issue as to valuable consideration, and that the trial court erred in granting summary judgment for the creditors with respect to the transfers to Cecil and Jean Kornegay.

VII

With respect to the conveyance to Kelvin Kornegay, it is undisputed that Kelvin paid an existing debt of \$2,000 in the name of Gerald Kornegay for the tract. The only question presented here thus becomes whether the record shows as a matter of law that this sum did not constitute a "fair and reasonable price" for the property. The creditors relied on an unsworn and uncertified financial statement executed by Gerald and Connie Kornegay, which indicated that the fair market value of the property was \$15,000. The creditors did not present any other independent assessment of the value of the property. In his sworn deposition, Gerald Kornegay testified to the contrary that the market value at the time of transfer had dropped to \$2,000 as a result of falling land prices, the cutting of timber off the land, and his own failure to complete planned drainage of it. In view of the authentication requirements for materials used to support summary judgment, this conflicting evidence presented a material issue as to the adequacy of consideration. N.C. Gen. Stat. § 1A-1, Rule 56(e) (1983) (certification required); see *under identical federal rule Zoslaw v. MCA Distributing Corp.*, 693 F. 2d 870 (9th Cir. 1982), *cert. denied*, --- U.S. ---, 76 L.Ed. 2d 349, 103 S.Ct. 1777 (1983) (un-

1. We reach this figure as follows: \$73,000 debt forgiveness + \$54,000 mortgage assumption + \$13,000 and \$30,000 debt assumption on house and grain facility.

Gillis v. Whitley's Discount Auto Sales

authenticated documents properly disregarded); *United States v. Dibble*, 429 F. 2d 598 (9th Cir. 1970) (merely attaching unauthenticated documents to affidavit insufficient). Summary judgment was therefore incorrectly granted as to this conveyance.

VIII

Accordingly, we hold that on the record before it the trial court erred in granting summary judgment voiding the conveyances. However, its ruling on the promissory notes was correct. The judgment appealed from is therefore

Affirmed in part; reversed in part.

Judges HILL and BRASWELL concur.

MARY GILLIS, GUARDIAN AD LITEM FOR WILLIAM TODD WALLACE v.
WHITLEY'S DISCOUNT AUTO SALES, INC.

No. 8320DC916

(Filed 4 September 1984)

1. Rules of Civil Procedure § 56; Trial § 3.2— summary judgment hearing—denial of continuance—absence of retained counsel—hearing conducted by associate

The trial court did not err in denying defendant's oral motion for continuance of a summary judgment hearing made on the ground that defendant's retained counsel was scheduled to argue before the Supreme Court on the day of the hearing where the trial court decided that an associate who made the motion could properly represent defendant at the hearing; the associate had been actively involved in the case for a prolonged time; the associate did not argue his lack of authority as the ground for his motion for a continuance; and defendant had filed no affidavits or other materials showing that there was a genuine issue for trial or an affidavit under Rule 56(e) showing why it was unable to present the necessary opposing material.

2. Rules of Civil Procedure § 56.1— summary judgment—affidavit filed on day of hearing

Although plaintiff's filing of an affidavit on the day of the hearing of a motion for summary judgment violated the technical requirements of G.S. 1A-1, Rule 6(d), admission of the affidavit was not prejudicial error where the information in the affidavit came as no surprise to defendant since defendant was put on notice by the summary judgment motion as to the contents of the affidavit, and the affidavit simply reiterated information defendant had gleaned on discovery.

Gillis v. Whitley's Discount Auto Sales

3. Appeal and Error § 4; Infants § 2.1— disaffirmance of minor's contract—defense of necessity not presented on appeal

In an action to disaffirm a minor's purchase of a car, since the affirmative defense that the car was a necessity was not pleaded or effectively argued before the trial court at a hearing on plaintiff's motion for summary judgment, it could not be raised for the first time on appeal.

4. Infants § 2— contract by minor—right to disaffirm—misrepresentation as to age

A minor's misrepresentation of his age did not bar him from disaffirming his contract for the purchase of a car.

5. Infants § 2.1— disaffirmance of minor's contract—recovery of consideration

When a minor disaffirms a contract, he may recover the consideration he has paid if he restores whatever part he still has of the benefit he received under the contract.

6. Infants § 2.1— minor's disaffirmance of car purchase—recovery of down payment

A minor was entitled to recover the down payment on the purchase of a car after his disaffirmance of the purchase and return of the car to defendant dealer where the down payment came from his savings account containing his accumulated social security benefits.

7. Infants § 2.1— minor's disaffirmance of car purchase—recovery of proceeds of bank loan—insufficient evidence

In an action to disaffirm a minor's purchase of a car, plaintiff's evidence on motion for summary judgment failed to show that the minor was entitled to recover the total proceeds of a bank loan used to purchase the car where plaintiff's materials failed to establish the minor's ongoing loan liability and the amount of the minor's payments on the loan.

APPEAL by defendant from *Burris, Judge*. Order entered 6 June 1983 in District Court, RICHMOND County. Heard in the Court of Appeals 11 May 1984.

Page, Page & Webb, by Alden B. Webb, for plaintiff appellee.

Pittman, Pittman & Dawkins, P.A., by Donald M. Dawkins, for defendant appellant.

BECTON, Judge.

From the denial of its motion for a continuance and the grant of summary judgment in favor of plaintiff in an action to disaffirm a minor's contract, defendant appeals.

Gillis v. Whitley's Discount Auto Sales

On 21 August 1981, William Todd Wallace purchased a 1977 Datsun automobile from Whitley's Discount Auto Sales, Inc. (Whitley's) for \$3,080. At the time, Wallace had just turned sixteen years old. Wallace paid \$1,200 in cash from Social Security benefits and financed the remaining \$1,880 with a car loan from Richmond County Bank. According to the credit application, Wallace was eighteen years old. Whitley's endorsed Wallace's credit application. After Wallace and the Datsun had been involved in two car accidents, Wallace returned the Datsun to Whitley's on 5 May 1982 and demanded payment of all monies paid.

When Whitley's did not return any of the purchase money, plaintiff, Mary Gillis, Wallace's guardian ad litem, brought this action on 15 June 1982 to disaffirm Wallace's contract with Whitley's, since it was entered into while Wallace was an unemancipated minor. In her amended Complaint, Gillis alleged that Wallace had "paid [Whitley's] \$1,200.00 in cash and the balance of \$1,880.00 was paid to [Whitley's] from proceeds of a loan to William Todd Wallace from Richmond County Bank. William Todd Wallace has paid \$839.65 to Richmond County Bank on the loan." Gillis sought to recover treble damages in the amount of \$9,240 for violations of N.C. Gen. Stat. § 75-1.1 (1981), the unfair or deceptive acts or practices statute. The treble damages figure was based on the total purchase price of \$3,080.

On 24 May 1983, Gillis made a motion for partial summary judgment on all issues except the violations of G.S. § 75-1.1, and Whitley's attorney received notice of the motion. Whitley's did not respond with affidavits or as otherwise provided by N.C. Gen. Stat. § 1A-1, Rule 56 (1983). The motion for partial summary judgment was heard on 6 June 1983. Whitley's oral motion for a continuance was denied. At the hearing, Gillis abandoned the G.S. § 75-1.1 claim. The trial court ordered Whitley's to pay \$3,080, the full purchase price of the Datsun, plus the costs of the action.

I

Whitley's contends, on appeal, that the trial court erred in (1) denying Whitley's motion for a continuance; (2) entering summary judgment on the issue of liability; and (3) awarding Wallace \$3,080 in damages.

Gillis v. Whitley's Discount Auto Sales

II

[1] On both 6 June 1983, the day of the hearing on the motion for summary judgment, and on the following day, 7 June 1983, Whitley's retained counsel, Donald M. Dawkins, was scheduled to argue before our Supreme Court. At the hearing on the motion, his associate, John Daniel, made an oral motion for a continuance until 8 June 1983. The trial court denied his motion. Whitley's argues on appeal that the trial court erred in denying its motion, since

[i]n this case, Donald M. Dawkins, a senior member of Pittman, Pittman & Dawkins, P.A., was specifically retained by Appellant to handle the case in its entirety. The sole purpose of John Daniel, the associate, in meeting the 'calendar call' was to make a motion to continue until Wednesday morning, June 8, 1983. He was not authorized to proceed with the hearing on summary judgment. Furthermore, the senior member, Donald M. Dawkins, had no authority to delegate Appellant's case to such junior member as the delegation of a case to a junior member without the express consent of a client who has specifically chosen a senior member would be unethical.

We affirm.

The granting of a motion for a continuance is within the trial court's discretion and its exercise will not be reviewed absent a manifest abuse of discretion. *Jenkins v. Jenkins*, 27 N.C. App. 205, 218 S.E. 2d 518 (1975); 4A N.C. Gen. Stat. App. I (5), General Rules of Practice for the Superior and District Courts 3 (Supp. 1983). In reviewing the record we note that Daniel had been actively involved in the case for a prolonged period of time. In fact, from December 1982 until the hearing in June 1983, Daniel signed all documents filed on behalf of Whitley's and received all documents sent by Gillis. Under these circumstances, the trial court did not abuse its discretion in deciding that Daniel could properly represent Whitley's at the hearing. Further, as the trial court stated at the hearing:

[S]ince it's basically a summary judgment, a question of law, I don't think there's anything—

MR. DANIEL: Thank you.

Gillis v. Whitley's Discount Auto Sales

THE COURT: —that would be prejudiced by him not being here, that you can't properly present for him.

Moreover, Dawkins was certainly aware when notice of hearing was served on 24 May 1983 that he would be arguing in the Supreme Court on 6 and 7 June. He should have attempted to reschedule the hearing in advance, rather than risk the suggestion of a delay tactic on the day of the hearing. *See Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971); *Jenkins*.

Whitley's argues that "[a] continuance for forty-eight hours would not seem to be an unreasonable delay in this case. Appellee's motion for summary judgment had been filed and served only twelve days although the case had been pending since June 22, 1982. . . ." G.S. § 1A-1, Rule 56(c) (1983) requires that a motion be served at least ten days before the date fixed for the hearing. Wallace complied with the notice requirement by serving the motion on 24 May 1983.

Further, it is clear from the transcript of the hearing that Daniel did not argue his own lack of authority as the grounds for his motion for a continuance. Instead, Daniel suggested that there were valid factual issues for the jury, but that he was unable to present the necessary opposing materials at the time.

On a motion for summary judgment the moving party has the burden of establishing that there is no genuine issue as to any material fact. G.S. § 1A-1, Rule 56(c) (1983); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). Once the moving party has met its burden, the opposing party may not rest on the mere allegations or denials of his pleading. G.S. § 1A-1, Rule 56(e) (1983); *Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 268 S.E. 2d 205 (1980). Instead, the opposing party must set forth specific facts showing that there is a genuine issue for trial, either by affidavits or as otherwise provided in G.S. § 1A-1, Rule 56 (1983). G.S. § 1A-1, Rule 56(e) (1983). If the opposing party is unable to present the necessary opposing material, he may seek the protection of G.S. § 1A-1, Rule 56(f) (1983), which gives the trial court the discretion to refuse the motion for judgment or order a continuance, if the opposing party states by affidavit the reasons why he is unable to present the necessary opposing material. Either an affidavit pursuant to G.S. § 1A-1, Rule 56(e) (1983) or an affidavit pursuant to G.S. § 1A-1, Rule 56(f) (1983) must be filed prior to

Gillis v. Whitley's Discount Auto Sales

the day of hearing. G.S. § 1A-1, Rule 56(c) (1983); 10A C. Wright & A. Miller, *Federal Practice and Procedure* § 2740, at 531 (2d ed. 1983) (hereinafter cited as Wright & Miller) (Federal Rule 56 substantially the same).

However, Whitley's had filed no affidavits or other materials, as provided in G.S. § 1A-1, Rule 56(e) (1983) showing that there was a genuine issue for trial. Nor had Whitley's filed an affidavit pursuant to G.S. § 1A-1, Rule 56(f) (1983), enabling the trial court to refuse the motion for judgment or order a continuance.

We conclude that the trial court did not abuse its discretion in denying Whitley's motion for a continuance.

III

[2] On the day of the hearing on Wallace's summary judgment motion, Gillis filed the affidavit of Ruby Wallace, the minor's grandmother, who stated:

That she is the grandmother of William Todd Wallace; that William Todd Wallace draws social security income by reason of the death of his father; that William Todd Wallace purchased an automobile from Whitley's Discount Auto Sales, Inc. in August, 1981; that the \$1,200 down payment that William Todd Wallace paid to Whitley's Discount Auto Sales, Inc. came from a savings account derived from William Todd Wallace's social security income, and from no other source.

The trial court relied on Mrs. Wallace's affidavit in making its finding of fact No. 8:

8. That the \$1,200.00 down payment paid by William Todd Wallace to defendant came from Social Security benefits paid to William Todd Wallace arising out of the death of said minor's father, as set forth in the affidavit presented.

Citing *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 203 S.E. 2d 421 (1974), *rev'd on other grounds*, 293 N.C. 431, 238 S.E. 2d 597 (1977), *aff'd*, 298 N.C. 246, 258 S.E. 2d 334 (1979), Whitley's contends that the affidavit was inadmissible under G.S. § 1A-1, Rule 56(c) (1983), and, therefore, this Court should vacate and remand for a new hearing. We find the affidavit admissible.

In *Nationwide*, this Court held that G.S. § 1A-1, Rule 6(d) (1983) requires that an affidavit in support of a Rule 56 motion be

Gillis v. Whitley's Discount Auto Sales

served with the motion at least ten days prior to hearing. This Court further held that the trial court may exercise its discretionary powers under G.S. § 1A-1, Rule 6(b) (1983) to order the time within which to file and serve the affidavits enlarged if the request is made prior to making the motion for summary judgment. If the request is made after the motion for summary judgment has been served, there must be a showing of excusable neglect. There is no evidence in the record to suggest that a request for enlargement of time was ever made. Although filing the affidavit on the day of the hearing violated the technical requirements of G.S. § 1A-1, Rule 6(d) (1983), nevertheless, on these facts, we find no prejudice in the admission of the affidavit. *Compare* 10A Wright & Miller, *supra*, § 2719, at 10-11 (no prejudice—failure to comply with notice requirement of Rule 56).

In Gillis' motion for summary judgment she stated:

In support of said motion, plaintiff shows unto the court the following:

* * *

5. The \$1,200.00 in cash paid by plaintiff to defendant represented funds of the plaintiff and plaintiff will furnish proof of the ownership of such funds at the hearing.

Mrs. Wallace's affidavit provided the promised proof. Therefore, Whitley's was put on notice by Wallace's motion as to the contents of the proffered affidavit, namely, that Wallace was asserting ownership of the \$1,200 down payment. Further, in Whitley's interrogatories, Whitley's asked, "If unemployed, by what means did William Todd Wallace acquire \$1,200.00 for the down payment to defendant for a 1977 Datsun automobile?" Gillis replied, "From Social Security benefits William Todd Wallace receives by reason of his deceased father." The contents of Mrs. Wallace's affidavit simply reiterated the information Whitley's had gleaned in discovery.

In *Nationwide* the affidavit filed on the day of the hearing contained information which was being offered for the first time that day. This Court stressed, "If this practice were permitted, affidavits in support of a motion for summary judgment could always come as a surprise to the opposing party and would effectively deny the opposing party a chance to present affidavits in

Gillis v. Whitley's Discount Auto Sales

opposition to the motion." *Nationwide*, 21 N.C. App. at 131, 203 S.E. 2d at 423-24.

The information in Mrs. Wallace's affidavit did not come as a surprise to Whitley's. Therefore, Whitley's was not denied the opportunity to file opposing affidavits. We conclude that the affidavit was admissible to support Wallace's motion for summary judgment and therefore that a new hearing is not warranted.

IV

Whitley's argues that the trial court erred in granting summary judgment on the issue of liability when there were legitimate issues of fact as to (1) whether the car was a necessity, and (2) whether Wallace perpetrated a fraud on Whitley's by misrepresenting his age. We affirm.

[3] Under the common-law rule, the conventional contracts of a minor are voidable, except those for necessities and those authorized by statute. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 597 (1977); *Gastonia Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E. 2d 19 (1970). The minor or his legal representative is free to disaffirm the minor's contract either during his minority or within a reasonable time after the minor reaches majority. *Id.* Whitley's did not plead the affirmative defense that the car was a necessary in its Answer, as required by N.C. Gen. Stat. § 1A-1, Rule 8(c) (1983). It is true that this Court recently held that "[u]np[le]d affirmative defenses may be heard for the first time on motion for summary judgment even though not asserted in the answer at least where both parties are aware of the defense." *Dickens v. Puryear*, 45 N.C. App. 696, 698, 263 S.E. 2d 856, 857-58 (1980), *rev'd on other grounds*, 302 N.C. 437, 276 S.E. 2d 325 (1981).

In *Dickens*, counsel for both sides had fully briefed and argued the unp[le]d affirmative defense before the trial court. Daniel simply raised the affirmative defense at the hearing, "[t]here's a question of fact as to whether or not the car was a necessity. . . ." He submitted no brief to the trial court. He was unprepared to argue before the trial court the specific facts comprising the unp[le]d affirmative defense. Since the affirmative defense that the car was a necessity was not pleaded or effectively argued before the trial court, it cannot be raised for the first time on appeal.

Gillis v. Whitley's Discount Auto Sales

Gilbert v. Thomas, 64 N.C. App. 582, 307 S.E. 2d 853 (1983). Whitley's should have avoided this result by submitting an affidavit under G.S. § 1A-1, Rule 56(e) (1983) stating the specific facts supporting its affirmative defense or by submitting an affidavit under G.S. § 1A-1, Rule 56(f) (1983), stating the reasons why it could not present the necessary opposing material as discussed in II, *supra*.

[4] Although pleaded as a defense, Whitley's second argument for vacating the summary judgment, Wallace's fraudulent misrepresentation of his age, also fails. A minor's representation of his age does not bar him from disaffirming his contract. *Greensboro Morris Plan Co. v. Palmer*, 185 N.C. 109, 116 S.E. 261 (1923); *Carolina Interstate Bldg. & Loan Ass'n v. Black*, 119 N.C. 323, 25 S.E. 975 (1896); see also Annot., 29 A.L.R. 3d 1270 (1970). Therefore, Wallace's allegedly fraudulent misrepresentation of his age was not a valid defense to Wallace's action to disaffirm his contract.

We hold that the trial court did not err in granting summary judgment on the issue of liability. Necessaries and fraudulent misrepresentation were not issues of fact in this action, for the reasons stated above.

V

Whitley's argues that even "[i]f [Wallace] was entitled to summary judgment as to liability . . . \$3,080.00 was not the appropriate measure of damages."

On a motion for summary judgment the moving party has the burden of establishing the absence of any issue of material fact. G.S. § 1A-1, Rule 56(c) (1983). On the issue of damages, Gillis failed to meet her burden to establish Wallace's entitlement to \$3,080, the full purchase price. We reverse in part and remand.

[5] When a minor disaffirms a contract, he may recover the consideration *he* has paid, if he restores whatever part he still has of the benefit he received under the contract. *Fisher v. Taylor Motor Co.*, 249 N.C. 617, 107 S.E. 2d 94 (1959). In *Fisher*, the minor's father gave the minor part of the purchase price for the car; the minor was entitled to recover the purchase price less the amount his father had paid. Consequently, in this case, Wallace is entitled

Gillis v. Whitley's Discount Auto Sales

to the consideration he personally has paid, since he has returned the damaged car to Whitley's.

[6] Gillis submitted her pleadings, Whitley's answers to her interrogatories, Wallace's credit application, and Mrs. Wallace's affidavit in support of her motion for summary judgment. In Gillis' original and amended unverified complaints she alleged:

On or about August 21, 1981, William Todd Wallace entered into a contract with defendant for the purchase of a 1977 Datsun automobile for the total price of \$3,080.00. William Todd Wallace paid to defendant \$1,200.00 in cash and the balance of \$1,880.00 was paid to defendant from proceeds of a loan to William Todd Wallace from Richmond County Bank. William Todd Wallace has paid \$839.65 to Richmond County Bank on the loan.

Whitley's admitted in its answers to Gillis' interrogatories that it had received \$1,200 in cash from William Todd Wallace. Mrs. Wallace stated in her affidavit that the \$1,200 cash payment came from her grandson's, William Todd Wallace's, savings account, which contained his accumulated social security benefits. Therefore, Gillis did establish that the \$1,200 in cash belonged to William Todd Wallace. Since Whitley's did not present opposing materials to contest Wallace's ownership of the \$1,200 cash payment or file a G.S. § 1A-1, Rule 56(f) (1983) affidavit to delay the hearing, Gillis was entitled to recover the \$1,200 as a matter of law. G.S. § 1A-1, Rule 56(c) (1983).

[7] However, Gillis has failed to show that Wallace is entitled to the \$1,880 in bank loan proceeds as a matter of law. In Gillis' unverified complaints she alleged that Wallace had entered into an \$1,880 loan agreement with Richmond County Bank. She further alleged that Wallace had paid \$839.65 on the loan. Whitley's admitted in its answers to Gillis' interrogatories that it had received \$1,880 of the purchase price from the Richmond County Bank, as evidenced by Wallace's credit application. None of the materials submitted on the motion for summary judgment establish Wallace's ongoing loan liability conclusively, especially in light of Wallace's credit application and Whitley's answers to Gillis' interrogatories, which reveal Whitley's liability as an endorser. Gillis' unverified complaint alone is insufficient to establish Wallace's loan payments. See 10A Wright & Miller, *supra*,

Gillis v. Whitley's Discount Auto Sales

§ 2722, at 46 & n. 3. Moreover, from the pleadings it is even unclear whether Wallace is current on his loan payments. Since Gillis has not met her burden, Whitley's is free to rely on the "mere allegations or denials of [its] pleading." G.S. § 1A-1, Rule 56(e) (1983). In its Answer, Whitley's alleged as

a further answer and second defense, defendant alleges that a large part of the purchase monies paid on the 1977 Datsun was not the property of the plaintiff but of other parties and/or corporations not parties to this lawsuit; and that such sums, the plaintiff is not entitled to recover from the defendant.

As a minor, Wallace is only entitled to recover the consideration he personally has paid or is continuing to pay under a valid loan agreement; he is not entitled, as a matter of law, to the total loan liability he originally incurred. *Fisher*. A minor is not entitled to a windfall. He is merely to be made whole. Therefore, the trial court erred in awarding Gillis the full loan amount, \$1,880, on summary judgment, based on the materials presented in support of the motion.

We reverse in part and remand to the trial court for further proceedings consistent with this decision.

VI

In conclusion, we find that the trial court did not err in denying Whitley's motion for a continuance and in granting Gillis' motion for summary judgment on the issue of liability, but did err in awarding damages of \$3,080 on summary judgment.

Reversed in part and remanded.

Judges WELLS and JOHNSON concur.

Childress v. Forsyth County Hospital Auth.

JACK CHILDRESS, ADMINISTRATOR OF THE ESTATE OF NANCY SUE JOHNSON NEESE, DECEASED v. FORSYTH COUNTY HOSPITAL AUTHORITY, INC., D/B/A FORSYTH MEMORIAL HOSPITAL; DR. RICHARD B. URBAN, DR. JAMES E. FERGUSON, DR. C. CLARK, DR. P. GALLE, DR. A. HARRINGTON, DR. JAMES, JOHN DOE AND JANE DOE

No. 8321SC917

(Filed 4 September 1984)

1. Process § 3.1— alias or pluries summons—reference to delayed filing of complaint

The delayed service of a complaint does not constitute a link in the chain of process, and an alias or pluries summons was not invalid because it referred to the original summons rather than to the subsequent delayed filing of the complaint.

2. Process § 2— simultaneous service of complaint and summons—failure to serve order extending time for filing complaint

When a plaintiff has obtained an order to extend the time for filing the complaint and subsequently timely files the complaint before service of the summons, simultaneous service of the complaint and an alias or pluries summons without the order extending the time for filing the complaint constitutes valid process which keeps alive the original filing date.

APPEAL by plaintiff from *Walker, Hal H., Judge*. Judgment entered 29 March 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 May 1984.

The deceased died at defendant Hospital, allegedly as a result of the negligent administration of drugs by defendants. Plaintiff brought the present wrongful death action, but all claims were dismissed for failure to effect proper service. Plaintiff appeals.

Alexander, Wright, Parrish, Hinshaw and Tash, by C. J. Alexander, II, and the law offices of E. Vernon F. Glenn, by E. Vernon F. Glenn and David P. Shouvin, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and Jodee Sparkman King, for defendant appellee Dr. Richard B. Urban.

JOHNSON, Judge.

Plaintiff and all defendants except Dr. Urban have resolved the matters in controversy between them and the appeal as to

Childress v. Forsyth County Hospital Auth.

them was dismissed on 20 January 1984. This Court retained jurisdiction over the appeal as to defendant Dr. Urban (hereinafter simply "defendant"); thus this appeal is properly before us. Defendant's contention that plaintiff has failed to comply with the Rules of Appellate Procedure in preserving his exceptions and assignments of error is groundless, and we therefore proceed to the merits.

I

The deceased died 27 June 1980. The statute of limitations therefore barred any action commenced after 27 June 1982. G.S. 1-53(4). The record establishes the following chronology of critical events:

25 June 1982: "Civil Summons" issued with "Application and Order Extending Time To File Complaint." Returned unserved 30 June 1982.

15 July 1982: "Delayed Service of Complaint" issued. Returned unserved 22 July 1982.

30 August 1982: "Civil Summons" issued. This summons was designated "Alias and Pluries Summons," with entry under "Date Last Summons Issued" of 25 June 1982. Returned unserved by Florida authorities 14 September 1982.

Thereafter, plaintiff obtained timely issuance of successive alias and pluries summonses, each referring back to the previous one, and each apparently accompanied by the complaint, until defendant received personal service of the summons and complaint on 4 November 1982. No copy of the "Application and Order" was ever served on defendant.

Defendant moved to dismiss on the ground that he had never received a copy of the application and order. He supported his motion with an affidavit acknowledging simultaneous receipt of the summons and the complaint. The trial court granted the motion; this ruling is the subject of this appeal.

II

The question on appeal appears to be one of first impression: When a plaintiff has obtained an order to extend the time for filing its complaint, and subsequently timely files the complaint before service is actually made, does substitution of the complaint

Childress v. Forsyth County Hospital Auth.

for the order for extension of time constitute valid process and keep alive the original date of filing, or has the "chain of process" been broken? We conclude that service of the complaint constitutes compliance with the statutory requirements, and that therefore the trial court erred in dismissing the plaintiff's action.

III

An action is ordinarily commenced by filing a complaint with the court. G.S. 1A-1, Rule 3; *compare* F.R. Civ. P. 3. North Carolina's Rule 3 also allows an action to be commenced by summons:

A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate.

In the present case, the summons and the order were properly issued together, and the complaint was filed within 20 days as required by the rule and the order. Actual service did not finally occur until some four months after filing of the complaint.

When a defendant is not served with process within the time allowed, the action may be continued in existence by either obtaining "an endorsement upon the original summons" or suing out an alias or pluries summons within 90 days. G.S. 1A-1, Rule 4(d). The action is discontinued upon failure to comply with Rule 4(d) within the 90 day period. G.S. 1A-1, Rule 4(e). Here, there is no question that plaintiff obtained his replacement summonses within the time required by the rules, in an unbroken chain from the first summons to the time of actual service.

Childress v. Forsyth County Hospital Auth.

IV

[1] There are only two grounds, then, that could cause the service of these alias or pluries summonses to be ineffective. The first would be that the summons of 30 August 1982 had to refer back to the process next preceding it, the delayed service of complaint. Since it referred instead to the original summons, it may be argued, the "chain" of process was not correctly maintained and the action discontinued.

We decline to adopt such a rule, however. The General Assembly, by adopting a less stringent standard of service for complaints filed under the late-filing provisions of Rule 3, clearly did not intend the delayed service of the complaint to be a link in the chain of process. This is especially true in light of the fact that the present option of service by mail for the late complaint constitutes a departure from the former practice requiring formal service. See G.S. 1-121 (Cum. Supp. 1967). This Court has held that Rule 3 requires only filing of the complaint, not service, within the 20-day period. *Hasty v. Carpenter*, 40 N.C. App. 261, 252 S.E. 2d 274, *disc. review denied*, 297 N.C. 453, 256 S.E. 2d 806 (1979). A complaint is not a summons. The relevant extension provisions of Rule 4 refer only to summons, endorsements upon summons, and "the chain of summonses." G.S. 1A-1, Rule 4(d)(1), 4(d)(2), 4(e). The former statutory rules for keeping alive an action speak exclusively of a "chain of summonses." G.S. 1-95 (Cum. Supp. 1967). The present rule continues the former practice. G.S. 1A-1, Rule 4, Comment. Finally, the State-printed document accompanying the delayed complaint is not entitled "Summons," but "Delayed Service of Complaint." We therefore hold that the delayed service of complaint does not constitute a link in the chain of process. The 30 August 1982 summons correctly referred back to the original summons and the chain of summonses properly related back to 25 June 1982.

V

[2] Defendant argues that since Rule 3 requires service of the summons and order extending time "in accordance with the provisions of Rule 4," the order must be served with each subsequent summons to constitute effective process. The alias and pluries summons eventually served, he argues, was "for the sole purpose

Childress v. Forsyth County Hospital Auth.

of serving the complaint, not the application and order," and therefore only related back to the filing of the complaint.

Rule 4 does ordinarily require the service of the summons and the complaint together. G.S. 1A-1, Rule 4(j)(1). By extension, then, service "in accordance with the provisions of Rule 4" would require service of the summons and order together. However, we believe that to continue to slavishly apply this rule long after filing of the complaint would entirely ignore the purpose of the rules and the functions of the various forms of process. Accordingly, we reject defendant's argument.

A

The summons constitutes the means of obtaining jurisdiction over the defendant. *See Stone v. Hicks*, 45 N.C. App. 66, 262 S.E. 2d 318 (1980) (defective summons means no jurisdiction); *Black's Law Dictionary* 1287 (5th ed. 1979). In order to be valid, the summons must run in the name of the State and must, unlike the complaint, bear the signature of the clerk of court or his deputy. G.S. 1A-1, Rule 4(b). The summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court. As such, defects in the summons receive careful scrutiny and can prove fatal to the action. *See Harris v. Maready*, 64 N.C. App. 1, 306 S.E. 2d 799 (1983).

B

The complaint, on the other hand, is a different animal. It need only be signed by a party or its attorney. G.S. 1A-1, Rule 11(a). It confers no jurisdiction. As noted above, it need not even be filed until after the lawsuit commences. G.S. 1A-1, Rule 3. The complaint serves to give the opposing party notice of the type of suit brought, the transactions or occurrences relied upon, and the relief demanded. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Unlike the summons, the complaint is liberally construed. *Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971). It gives only general notice which subsequent discovery may focus into the narrow legal issues at trial. *Sutton v. Duke, supra*.

The application and order is even more conclusory. It need only state "the nature and purpose" of the action. G.S. 1A-1, Rule 3. The order's purpose is only to give the defendant "preliminary notice" of the type of suit. *Morris v. Dickson*, 14 N.C. App. 122,

Childress v. Forsyth County Hospital Auth.

187 S.E. 2d 409 (1972). It merely serves as a warning that a more detailed complaint will be filed; in fact, this Court has held that a Rule 3 order which fails entirely to state the nature and purpose of the action does not constitute grounds for dismissal. *Id.*, following *Roberts v. Bottling Co.*, 256 N.C. 434, 124 S.E. 2d 105 (1962). Therefore, once the complaint has been filed and is available to accompany the summons in search of defendant(s), any rationale for continuing to require service of the order diminishes to total insignificance. Defendant's insistence that the only purpose of the summons was to effectuate service of the complaint, not the order, and that this was somehow improper, has no basis in anything but technicality. In fact, the purpose defendant contends is improper appears to be one of the very purposes for which the summons exists and is used in the first place.

Defendant's own affidavit establishes that he received the summons and complaint together, and thus that no possible prejudice or surprise could have resulted. See *Sharpe v. Pugh*, 270 N.C. 598, 155 S.E. 2d 108 (1967) (no surprise by addition of new cause of action); *Morris v. Dickson*, *supra*. As has been pointed out often enough since the adoption of our Rules of Civil Procedure, they reflect an intent to end the worship of procedural technicality over substance. *Id.*; see J. Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest L. Rev. 1, 4-7 (1969). To hold for defendant on this point would clearly run contrary to this policy. The failure to serve the order extending time accordingly did not constitute grounds for dismissal.

VI

To recapitulate, we hold: (1) that the "Delayed Service of Complaint" did not constitute a necessary link in the chain of summonses and that plaintiff properly kept his action alive; and (2) that the simultaneous service of the summons and the timely-filed complaint without an accompanying copy of the order extending time does not constitute grounds for dismissal. Therefore, plaintiff's action never discontinued, and the trial court erred in dismissing it. The order is

Reversed.

Judges WELLS and BECTON concur.

Waynick Construction v. York

WAYNICK CONSTRUCTION, INC. v. MARION FRANKLIN YORK AND WIFE,
HARRIS WYLIE YORK

No. 8319SC736

(Filed 4 September 1984)

1. Appeal and Error § 26— exception to entry of order—questions presented

Defendant's broadside exception to the entry of an order presents on appeal the question of whether the findings support the conclusions of law and in turn the judgment.

2. Rules of Civil Procedure § 52— purpose of detailed findings—purpose of separate conclusions

The requirement of G.S. 1A-1, Rule 52 that the trier of fact find the facts specially and state separately its conclusions of law thereon is not simply a rule of empty ritual. The purpose of detailed findings of specific facts is to allow a reviewing court to determine from the record whether the judgment and the underlying legal conclusions represent a correct application of the law; the purpose for requiring conclusions of law to be stated separately is to enable the reviewing court to determine what law the court applied to the facts found.

3. Trial § 58— insufficient findings of fact

The trial court's findings detailing the procedural facts that plaintiff had filed a claim of lien and that the parties had stipulated that the judgment might be entered out of district and out of term, reciting the terms of the contract, the payments actually made thereunder and the outstanding balance which defendants refused to pay, and stating simply that plaintiff had "substantially complied" with the contract were insufficient to resolve the issues of the case.

4. Contracts § 21.2— construction contract—substantial performance—action for nonapparent defects

Performance of a construction contract in substantial accordance with the specifications does not preclude an action for defects not readily apparent upon completion.

5. Evidence § 48— expert witness—failure to tender as expert

A formal offer of an architect to the court as an expert was not required for the architect to state his opinions where the architect's qualifications were presented at length and defendant's intent to offer him as an expert was clear.

6. Evidence § 47— expert testimony—personal knowledge not required

Where the facts upon which an architect intended to rely in answering a question were already in evidence through defendant's other technical witness, personal knowledge was not a prerequisite for the architect to give an opinion; accordingly, the trial court erred in excluding the architect's opinion as to the cost of repair of a house on the ground that he did not have personal knowledge of the dimensions of the house.

Waynick Construction v. York

7. Appeal and Error § 49.1— exclusion of evidence—offer of proof in record

Ordinarily, an offer of proof in the record is necessary to appellate review of rulings excluding evidence, but such an offer is not absolutely essential if the record plainly discloses the significance of the evidence.

8. Appeal and Error § 62.1— inadequate findings—remand for new trial

Where the trial court's findings are clearly inadequate, the appellate court may order a new trial rather than remand the case for further proceedings to supply the deficiencies.

APPEAL by defendants from *Lane, Judge*. Judgment entered 9 February 1983 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 13 April 1984.

Plaintiff company built a house pursuant to a general contract with defendants. The contract price was cost of materials and labor plus an 11% contractor's fee upon completion. Defendants indicated some dissatisfaction during the progress of construction, but paid all materials and labor invoices. They refused, however, to pay the contractor's fee of some \$17,000 when plaintiff ended his work on the project. Plaintiff sued; defendants counterclaimed, alleging various breaches by plaintiff, including numerous instances of defective workmanship. Upon trial before the court, plaintiff presented evidence tending to show a good faith effort to construct the house, which was hampered and delayed by defendants' demands. Defendants' evidence tended to show that plaintiff abandoned the project after a pattern of inattention and shoddy workmanship. The court dismissed the counterclaim and entered judgment for plaintiff for the fee. Defendants appeal.

Wilson & Kastner, by James L. Wilson, for defendant appellants.

Douglas, Ravenel, Hardy, Crikfield & Lung, by John W. Hardy, for plaintiff appellee.

JOHNSON, Judge.

I

[1] Plaintiff contends that defendants have not excepted to the findings of fact of the court, but only to the entry of the order, and that therefore defendants' assignments of error are not properly before this Court. *See App. R. 10(b); 1 Strong's N.C. Index 3d*

Waynick Construction v. York

Appeal and Error § 28 (1976). It is well established that defendants' broadside exception presents on appeal the question of whether the findings, established by the failure to make specific exceptions, support the conclusions of law and in turn the judgment. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 292 S.E. 2d 159 (1982). It also presents conclusions of law denominated as findings of fact. *Clark v. Richardson*, 24 N.C. App. 556, 211 S.E. 2d 530 (1975) (reviewing unexcepted "findings").

II

[2] In the present case the court sat as finder of fact and entered written judgment. Its duties as trier of fact were to "find the facts specially and state separately its conclusions of law thereon." G.S. 1A-1, Rule 52(a)(1). The requirements of Rule 52 are not simply rules of "empty ritual." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). The purpose of detailed findings of specific facts is to allow a reviewing court to determine from the record whether the judgment and the underlying legal conclusions represent a correct application of the law. *Id.* The purpose for requiring conclusions of law to be stated separately is to enable the reviewing court to determine what law the court applied to the facts found. *Hinson v. Jefferson*, 287 N.C. 422, 429, 215 S.E. 2d 102, 107 (1975).

[3] The trial court failed to make any conclusions of law in the present case. Our ensuing difficulty in determining the theory of law applied is compounded by the paucity of relevant findings of fact. Other than detailing the procedural facts that plaintiff had filed a claim of lien and that the parties had stipulated that the judgment might be entered out of district and out of term, the court made only three findings of fact. Two of these simply recited the terms of the contract, the payments actually made thereunder and the outstanding balance which defendants refused to pay. None of these findings resolved any matters in dispute.

The third and critical finding was simply that plaintiff had "substantially complied" with the contract. This is the only finding in the judgment resolving any matter in dispute. Even when we accept this finding as established, it does not provide a basis for conclusively resolving all the issues of the case.

Waynick Construction v. York

III

[4] Under the law of construction contracts, a party is entitled to receive what he contracted for or its equivalent. *Robbins v. Trading Post*, 251 N.C. 663, 666, 111 S.E. 2d 884, 887 (1960). "Substantial compliance" is not the same as full compliance. *Moss v. Knitting Mills*, 190 N.C. 644, 648, 130 S.E. 635, 637 (1925). Substantial compliance requires only ordinary care and skill, and damages for the repair of defects may still be recovered. *Id.* More recently, our Supreme Court has held that performance of a construction contract in substantial accordance with the specifications does not preclude an action for defects not readily apparent upon completion, such as those contested here. *Realty Co. v. Batson*, 256 N.C. 298, 123 S.E. 2d 744 (1962); see Restatement (Second) of Contracts § 246 Comment d, illustration 6 (1981).

Defendants had counterclaimed for such damages but that counterclaim was involuntarily dismissed by the court. If that ruling was correct, no claim for damages lay before the court at the time it entered the final judgment and we might affirm. Here again, however, the court failed to make any findings of fact despite the clear mandate of the Rules of Civil Procedure. G.S. 1A-1, Rule 41(b); G.S. 1A-1, Rule 52; see *Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 89, 268 S.E. 2d 567, 571-72 (1980) (failure is reversible error). The only reason apparent on the record for the dismissal is that defendants failed to show any amount of damages. This Court has recently reiterated the applicable rules governing damages in cases such as this:

"The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that a party is entitled to have what he contracts for or its equivalent. What the equivalent is depends upon the circumstances of the case. In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contrac-

Waynick Construction v. York

tor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value." [Citations omitted.] The difference referred to is the difference between the value of the house contracted for and the value of the house built—the values to be determined as of the date of tender or delivery of possession to owner.

LaGasse v. Gardner, 60 N.C. App. 165, 168-69, 298 S.E. 2d 393, 396 (1982), quoting *Robbins v. Trading Post*, *supra*, at 666, 111 S.E. 2d at 887.

It is unclear which of these theories the court applied in dismissing the counterclaim. Plaintiff contends that all the evidence showed that the existing floors would first have to be destroyed to achieve compliance, and that defendants put on no evidence as to relative value, and that dismissal was accordingly proper. Defendants contend that their evidence concerned repairs to bring the work into conformity, and that no destruction was required; since their evidence as to the cost of repair was excluded, to which they also assign error, they could not show damages. If the evidence was improperly excluded, they argue, the dismissal was also improper. Nothing in the evidence affirmatively indicates that existing work need be destroyed or substantially undone to achieve conformity. We held in *LaGasse* that in cases such as this the court must specifically rule which theory applies. Again, the court erred failing to make such findings.

IV

The principal reason that defendants did not present evidence of damages supporting their theory is because the court excluded such evidence. Defendants attempted to put on "cost of repair" testimony through opinion testimony of an architect, but it was excluded by the court on hearsay grounds, *i.e.*, that the architect did not have personal knowledge of the dimensions of the house and therefore could not estimate the cost of repair.

A

[5] We note first that defendants failed to offer the architect to the court as an expert. Under the circumstances of the case, however, the lack of a formal offer does not prevent review. The architect's qualifications were presented at length and defendants'

Waynick Construction v. York

intent to offer him as an expert was clear. Defendants repeatedly asked for the architect's opinions on technical issues and asked him to describe his calculations. The adverse rulings of the court were expressly stated with the grounds therefor. On identical facts our Supreme Court has held that a formal tender is not an essential prerequisite to eliciting an opinion. *Dickens v. Everhart*, 284 N.C. 95, 103, 199 S.E. 2d 440, 444 (1973) (to require formal offer "exalts form over substance").

B

[6] The facts upon which the architect intended to rely in answering the question were already in evidence through defendants' other technical witness. As such, personal knowledge was not a prerequisite for him to give an opinion. *State v. Grady*, 38 N.C. App. 152, 247 S.E. 2d 624 (1982); see 1 H. Brandis, N.C. Evidence § 137 at 546 (1982); G.S. § 8C-1, Rule 703 (Supp. 1983). Accordingly, the court erred in excluding the architect's opinion as to cost of repair, especially in view of the fact that the trial took place before the court, not a jury. See 1 H. Brandis, N.C. Evidence § 4A (1982) (rules more relaxed).

C

[7] Nevertheless, argues plaintiff, the error is not properly before this Court since defendants did not put an offer of proof into the record. Ordinarily, such an offer is necessary to appellate review of rulings excluding evidence; however, it is not absolutely essential if the record plainly discloses the significance of the evidence. *Currence v. Hardin*, 296 N.C. 95, 249 S.E. 2d 387 (1978). Here, it is clear that the significance of the excluded evidence was only the dollar amount of the architect's estimate. The architect did present testimony, although subsequently stricken, that removal of some studs to effect the repair would cost \$250. This appears to be as much a part of the whole record as excluded evidence offered outside the record of testimony. Furthermore, we can safely say that the remaining work which the architect testified was necessary would not be done for free. It is well established that once breach of a contract has been shown, the claimant is entitled to at least nominal damages. See 3 Strong's N.C. Index 3d Contracts § 29 (1976). The only significance of the excluded testimony would be to increase the dollar amount of alleged damages. It would not affect basic questions of liability.

State v. Smith

Compare Currence v. Hardin, supra (no offer of proof of medical diagnosis of plaintiff, not reviewable). Accordingly, we hold that the failure to make a formal offer does not preclude appellate review in this case, and we again find error in the exclusion of the evidence.

V

[8] Having found numerous errors, the proper disposition of the case now must be determined. Ordinarily, where the court fails to make some findings necessary to support the judgment, we may remand for further proceedings to supply the few deficiencies. See *Henderson v. Henderson*, 307 N.C. 401, 409-10, 298 S.E. 2d 345, 351 (1983) (remand for findings solely on willfulness). On the other hand, the appellate courts may also order a new trial where findings are clearly inadequate, as we believe they are here. *Quick v. Quick*, 305 N.C. 446, 458-59, 290 S.E. 2d 653, 661-62 (1982). The failure of the court to make any findings in dismissing the counterclaim reinforces our conclusion, *Graphics, Inc. v. Hamby, supra* (new trial), as do the erroneous evidentiary rulings. Accordingly, the judgment is vacated and the cause remanded for a new trial.

New trial.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. ALTON GORDON SMITH

No. 8316SC1175

(Filed 4 September 1984)

1. Criminal Law § 92.3— refusal to consolidate charges— no transactional connection

The trial court properly refused to consolidate breaking or entering and larceny charges filed against defendant in Robeson County with breaking or entering and larceny charges filed against him in Scotland County where the crimes lacked a transactional connection, there being no requirement of joinder based upon a common *modus operandi*.

State v. Smith

2. Criminal Law § 91— speedy trial violation— dismissal of charges “without prejudice”—insufficient findings

The court erred in dismissing indictments against defendant “without prejudice” for the State’s violation of the speedy trial statutes where the court’s order did not contain findings of fact relating to each of the factors set forth in G.S. 15A-703.

3. Constitutional Law § 50— constitutional right to speedy trial—delay between original indictment and trial

Defendant’s constitutional right to a speedy trial was not violated by a year’s delay between the original indictments and his trial where the delay was caused by the unavailability of defendant while he was in custody of federal marshals, the unavailability of a key State’s witness while he was recuperating from an injury, and the pendency of motions filed by defendant, and where defendant failed to show any prejudice resulting from the delay.

APPEAL by defendant from *Herring, Judge*. Judgments entered 22 April 1983 in SCOTLAND County Superior Court. Heard in the Court of Appeals 22 August 1984.

On 19 April 1982, defendant was indicted on five counts of felonious breaking or entering and five counts of felonious larceny. Defendant was charged with two similar offenses in Robeson County. On 5 May 1982, defendant filed a motion to join the Robeson County and Scotland County cases for trial. On 28 September the motion was denied and on 30 September defendant was convicted of felonious breaking or entering and felonious larceny in Robeson County. On 2 February 1983 defendant filed a motion to dismiss the Scotland County cases for a violation of his right to a speedy trial. This motion was allowed without prejudice. On 11 April 1983, the grand jury returned a second set of indictments charging defendant with the same offenses.

As a result of a plea bargain, Timothy Cox, who was arrested on 30 December 1981 for these offenses, became the principal witness against defendant. Cox’s testimony tended to show that in November 1981 defendant talked with him about committing some burglaries. He testified that defendant told him how to gain entry by crushing the doorknob with pliers and prying the door open. On 27 November 1981 defendant took him to the residence of Tony Davis, where he broke in and took various items of value. After the break-in defendant picked him up a short distance from the Davis residence. Later that same afternoon defendant dropped Cox off about a hundred yards from the Strickland

State v. Smith

residence. Cox broke in and took various items of jewelry and cash. Defendant picked Cox up a short distance from the house and he and Cox divided the money and buried the jewelry in defendant's backyard.

Cox also testified that defendant told him that Joyce Howell's residence contained valuable diamonds. Defendant then dropped Cox off a short distance from the Howell residence. Cox entered the residence and stole a pistol and some jewelry. This jewelry was also buried in defendant's backyard. Cox's testimony also implicated defendant in a break-in which occurred at the Elmer Kottyan residence which resulted in the theft of several items including jewelry.

Cox also connected defendant to some burglaries which occurred in Robeson County. The state offered evidence from two other witnesses. One witness testified that defendant had earlier solicited him to break into the Howell residence and had talked with him about the items taken from the house. The other witness testified that defendant had bought jewelry from her knowing the same to be stolen and had encouraged her to steal certain items from her best friend. Defendant offered no evidence.

The jury convicted defendant of four counts of breaking or entering and four counts of larceny. Defendant was sentenced to ten years imprisonment for the breaking or entering convictions and to a consecutive ten-year term for the larcenies. From these judgments defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General William R. Shenton, for the State.

Appellate Defender Adam Stein, by James R. Glover of the Appellate Defender Clinic of the University of North Carolina School of Law, for defendant.

WELLS, Judge.

[1] Defendant first contends that the trial court erred by denying his motion to consolidate for trial the charges filed against him in Robeson County with the Scotland County charges. N.C. Gen. Stat. § 15A-926 (1975) in pertinent part provides:

(a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses . . . are

State v. Smith

based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. . . .

. . .

(c) Failure to Join Related Offenses.

(1) When a defendant has been charged with two or more offenses joinable under subsection (a) his timely motion to join them for trial must be granted unless the court determines . . . for some other reason, the ends of justice would be defeated if the motion were granted. . . .

G.S. § 15A-926 requires a "transactional occurrence" between offenses sought to be joined for trial. *State v. Avery*, 302 N.C. 517, 276 S.E. 2d 699 (1981). The statute does not require joinder based merely upon the fact that offenses are of the same class or crime or have common characteristics. See *State v. Wilson*, 57 N.C. App. 444, 291 S.E. 2d 830, *disc. rev. denied*, 306 N.C. 563, 294 S.E. 2d 375 (1982). Our research has revealed no cases which have required joinder based upon a common *modus operandi*. In cases where joinder has been found to be proper the common denominator has been the short time interval during which the crimes were committed. See *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980) (where the joined offenses occurred during the same afternoon); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978) (where the offenses occurred within a three hour time span); and *State v. Old*, 272 N.C. 42, 157 S.E. 2d 651 (1967) (where offenses occurred with two hour time span).

The defendant relies upon a statement by the District Attorney that the break-ins were conducted according to a "common scheme or common design" to support his right to joinder. By this statement the prosecutor was apparently referring to the fact that all the crimes had common characteristics or a similar *modus operandi*. The crucial element of time is missing from the equation. The crimes were committed over the period of a month's time and, therefore, lack the transactional connection to require that they be joined for trial under the theory that they were all parts of a single scheme or plan. The trial court properly denied defendant's motion to join the Robeson County and Scotland County cases for trial. The assignments of error are overruled.

State v. Smith

Next defendant argues that he was entitled to have the charges against him dismissed with prejudice because of a denial of his statutory and constitutional rights to a speedy trial. Defendant was indicted for these offenses on 19 April 1982. The indictments were dismissed without prejudice on 9 February 1983 because of the state's violation of the speedy trial statutes. On 11 April 1983 defendant was again indicted on these offenses. Defendant now argues the court erred by failing to dismiss the original cases with prejudice.

[2] Whether a case should be dismissed with or without prejudice because of a violation of the speedy trial statutes is governed by N.C. Gen. Stat. § 15A-703 (1983). The factors to be considered are: (1) the seriousness of the offenses; (2) the facts and circumstances that led to dismissal; (3) the impact of re-prosecution on the administration of the Article; and (4) the impact of re-prosecution on the administration of justice. This court has interpreted G.S. § 15A-703 as follows:

The Statute . . . leaves in the discretion of the trial court the determination of whether dismissal should be with or without prejudice. It *mandates*, however, that the court consider *each* of the factors set forth in making that determination. Thus, failure to establish in the record that the court has considered each of these factors, and to establish its conclusions with regard to each, may leave the reviewing court no choice but to find an abuse of discretion . . . We . . . suggest that trial courts detail for the record findings of fact and conclusions therefrom demonstrating compliance with the mandate of [the Statute] . . . [Emphasis in original.]

State v. Washington, 59 N.C. App. 490, 297 S.E. 2d 170 (1982) (quoting from *State v. Moore*, 51 N.C. App. 26, 275 S.E. 2d 257 (1981)).

The trial court's order does not contain findings of facts and conclusions from which we can determine that the statutory mandate has been followed. The mere statement that the court has considered "the matters alleged in the bills of indictment and the provisions of the General Statutes § 15A-703, Paragraph (a)" falls far short of the requirement established in *State v. Moore*, *supra* and re-emphasized in *State v. Washington*, *supra*. Defendant's rights in this case were further compromised by the trial court's

State v. Smith

refusal to allow defendant to make a record as to prejudice. Immediately upon the trial court's ruling of "without prejudice," defendant moved that he be allowed to show the court how he had been prejudiced by the delays in his trial. That motion was denied. We are now left with a record bereft of findings or evidence as to prejudice to defendant's rights. Under these circumstances, we hold that the trial court's failure to make the findings consistent with the requirements of G.S. § 15A-703 requires a new trial. Prior to retrial the trial court must reconsider defendant's motion and make findings of fact and conclusions consistent with G.S. § 15A-703 and our decisions in *State v. Moore, supra* and *State v. Washington, supra*.

[3] Next we consider whether defendant's constitutional right to a speedy trial was violated. In *State v. Tann*, 302 N.C. 89, 273 S.E. 2d 720 (1981), our supreme court set forth four factors to be considered when determining whether a defendant's constitutional right to a speedy trial had been violated. The factors were (1) the length of the delay; (2) the reason for the delay; (3) any waiver of the right by the defendant; and (4) any prejudice to the defendant. While defendant's trial was delayed for a longer period of time than is desirable, there appears to be several valid reasons for the delay including the unavailability of the defendant while he was in the custody of the federal marshals, the unavailability of a key state's witness while he was recuperating from an injury, and the pendency of motions filed by the defendant. This, coupled with defendant's failure to show that any prejudice resulted from the delay, convinces us that defendant's constitutional right to a speedy trial has not been violated. Defendant's argument regarding a violation of his constitutional right to a speedy trial is overruled.

Since we have awarded defendant a new trial, we deem it inappropriate to discuss or decide defendant's other assignments of error as they are unlikely to occur on retrial.

New trial.

Chief Judge VAUGHN and Judge HEDRICK concur.

Barnaby v. Boardman

NEIL BARNABY AND MARINA VILLAGE, INC. v. ELBRIDGE H. BOARDMAN
AND WIFE, RUTH R. BOARDMAN AND O. L. GRAHAM, TRUSTEE

No. 833SC594

(Filed 4 September 1984)

Mortgages and Deeds of Trust § 32.1— anti-deficiency judgment statute—inapplicable where security released

The anti-deficiency judgment statute did not prohibit an action on a promissory note by the holder of a purchase money deed of trust who, at the time of default, was insecure because he had released his security in accordance with the terms of an agreement contained in the purchase money deed of trust.

APPEAL by defendants from *Freeman, Judge*. Judgment entered 12 May 1983 in Superior Court, CARTERET County. Heard in the Court of Appeals 5 April 1984.

Plaintiffs instituted this action on 17 February 1982 seeking damages for misrepresentation of property sold by defendants to plaintiff, Barnaby, and a restraining order to prevent the defendants from exercising a power of sale contained in a purchase money deed of trust securing said property.

In their answer and counterclaim, the defendants denied any wrongdoing, pleaded estoppel, and counterclaimed for the amount allegedly due on the promissory note previously secured by a purchase money deed of trust. All the parties filed motions to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). From the Order granting the plaintiffs' motion to dismiss defendants' counterclaim for failure to state a claim upon which relief could be granted, defendants appealed.

Kenneth M. Kirkman, P.A., by John E. Wray, Jr., for plaintiff-appellees.

Sumrell, Sugg & Carmichael, by Fred M. Carmichael and Rudolph A. Ashton, III, for defendant-appellants.

JOHNSON, Judge.

On or about 28 December 1978, plaintiff, Barnaby, purchased a tract of land located in the Cedar Island Township of Carteret County from defendants for \$150,000.00. At the closing, Barnaby

Barnaby v. Boardman

paid to the defendants the sum of \$5,000.00, and executed a promissory note secured by a purchase money deed of trust which provided that:

Grantor shall be entitled, from time to time, to the release or subordination of certain portions of the property conveyed herein, which release and subordination provisions are contained in that certain agreement between the parties hereto, dated the 15th day of December, 1978, the same being incorporated herein by reference.

Thereafter, defendants, in compliance with the above agreement, executed three deeds of release and a non-warranty deed, fully releasing the mortgaged property from the lien of the purchase money deed of trust.

On or about 26 May 1981, Barnaby conveyed the property to plaintiff, Marina Village, Inc., a corporation owned solely by the plaintiff and his wife. The deed conveying the property to Marina Village, Inc., contained the following:

THIS CONVEYANCE is made subject to the following deeds of trust and the Grantee agrees to assume and to pay said obligations under the terms of the Promissory notes and all other instruments creating any obligations on said property:

To O. L. Graham, Trustee for Elbridge H. Boardman and wife Ruth R. Boardman as recorded in Book 421, Page 262. . . .

Subsequent to this conveyance, Barnaby failed to pay the indebtedness in accordance with the terms of the note. He also failed to comply with the terms of an agreement extending, at his request, the time for payment. Finally, on 8 February 1982, defendants commenced foreclosure proceedings.

On 17 February 1982, plaintiffs filed this action alleging that defendants had released all their interest in the property; that defendants Boardman had no authority to instruct defendant Graham to commence foreclosure proceedings; and that defendants misrepresented and concealed certain facts about the property.

Defendants' answer, admitting the release of the property from the lien of the purchase money deed of trust, contained an

Barnaby v. Boardman

amended counterclaim and a second amended counterclaim, which are, in pertinent part, as follows:

7. That there remains due and owing on the indebtedness evidenced by the aforesaid promissory note (Exhibit B) the sum of Eighty Two Thousand One Hundred Forty One and 56/100 Dollars (\$82,141.56) as of December 15, 1982 [sic] and that interest continues to accrue according to the terms thereof.

8. That the Plaintiffs have failed and refused to pay said indebtedness according to the terms thereof and according to the terms of an extension of time heretofore agreed by the Defendants and that the Defendants have demanded payment of said indebtedness but the Plaintiffs have steadfastly failed and refused and continue to fail and refuse to pay said indebtedness; that the promissory note is presently in default and due and payable immediately and the Defendants, as holders of the promissory note have declared the remainder of the debt due and payable.

. . . .

10. That the Plaintiffs caused to be prepared and presented to Defendants for Defendants signatures, at the request of Plaintiffs, certain documents purporting to be deeds of release and a non-warranty deed describing the entire property described in the deed of trust (Exhibit C), all of which were executed by the Defendants at the request of Plaintiffs, and all is alleged in paragraphs 3 and 4 of the Plaintiff's second cause of action and if the Court should find that said documents release the property in its entirety from the provisions of the deed of trust (Exhibit C) the Defendants are unsecured in the payment of the aforesaid promissory note (Exhibit B) and will not have the remedy of foreclosure of said deed of trust.

All the parties filed motions to dismiss under G.S. 1A-1, Rule 12(b)(6). Defendants' motion to dismiss was allowed as to plaintiffs' first, third, and fourth claims for relief. These claims, which are not before us on review, are discussed, herein, insofar as they are applicable. From the Order granting plaintiffs' motion to dismiss the defendants' amended and second counterclaims, defendants appeal.

Barnaby v. Boardman

Defendants, in their sole assignment of error, contend that the court erred in dismissing their counterclaim pursuant to G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. We agree.

Under the "notice theory of pleading," a statement of a claim can withstand a motion to dismiss if it gives the other party notice of the nature and basis of the claim sufficient to enable the party to answer and prepare for trial. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). A claim for relief should not be dismissed unless it appears beyond doubt that the party is entitled to no relief under any state of facts which could be presented in support of the claim. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Therefore, the essential question on a Rule 12(b)(6) motion, is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory. *Benton v. Construction Co.*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975). A counterclaim is substantially the allegations of a cause of action on the part of the defendant against the plaintiff. Therefore, these rules regarding the sufficiency of a complaint to withstand a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted, are equally applicable to a claim for relief by a defendant in a counterclaim.

In *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979), our Supreme Court, in construing the anti-deficiency judgment statute, held that a holder of a purchase money mortgage or deed of trust cannot disregard his security and bring an *in personam* action against the debtor on the note secured by the mortgage or deed of trust. Therefore, the anti-deficiency judgment statute effectively limits the purchase money mortgagee, upon default, to the property conveyed or to the proceeds from its sale. The purchase money mortgagee is, also, expressly precluded from bringing an action on the note to recover a deficiency. *Id.* at 373, 250 S.E. 2d at 275. It is axiomatic that the premise underlying the anti-deficiency judgment statute and the *Realty Co.*, *supra*, decision, is that the holder of a purchase money mortgage or deed of trust, upon default, will receive the property conveyed or the proceeds from its sale. Neither the anti-deficiency statute nor *Realty Co.*, *supra*, purports to determine or restrict the rights of a purchase money mortgagee who, at the time of default, is unsecured

Henderson v. Traditional Log Homes

because he, the mortgagee, has released his security in accordance with the terms of an agreement contained in the purchase money mortgage or deed of trust.

The essential of defendants' counterclaim, quoted above, is that the anti-deficiency judgment statute has no application to their action on the note because they released the security from the lien of the purchase money deed of trust. As a result, the promissory note is now unsecured. Hence, there is no outstanding deed of trust compelling application of the anti-deficiency judgment statute.

For the reasons stated, we hold that the order of the trial court granting plaintiffs' motion to dismiss defendants' counterclaim for failure to state a claim upon which relief could be granted, must be and is hereby reversed.

Reversed and remanded.

Judges HEDRICK and HILL concur.

DAVID A. HENDERSON v. TRADITIONAL LOG HOMES, INC.

No. 8323SC778

(Filed 4 September 1984)

Master and Servant § 10.2— retaliatory discharge for compensation claim — sufficiency of evidence

Plaintiff's evidence was sufficient for the jury in an action brought pursuant to G.S. 97-6.1 to recover damages for retaliatory discharge for filing a workers' compensation claim where it tended to show that plaintiff was employed as an inspector by defendant; in April 1980 plaintiff sustained a work-related injury by accident; plaintiff filed a workers' compensation claim in connection with this injury; when his compensation checks were discontinued after a short time, plaintiff hired an attorney to represent him in this claim; plaintiff returned to work in August 1980 but was unable to complete a full day because the heavy work aggravated his previous injuries; plaintiff again attempted to return to work in September 1980 and his request for light duties was denied; a couple of months later, defendant sent plaintiff a letter requesting an update of his compensation claim, and plaintiff informed defendant that his claim was pending before Industrial Commission; shortly thereafter, plaintiff received a letter informing him that he was "laid-off"; other employees "laid-off" at the same time as plaintiff were the last three people to

Henderson v. Traditional Log Homes

be hired by defendant; eight other employees with less seniority than plaintiff were retained by defendant; plaintiff was never called back to work by defendant; and defendant's supervisors' handbook listed seniority as one of the factors to be considered when determining who should be laid-off.

APPEAL by defendant from *Collier, Judge*. Judgment entered 10 March 1983 in Superior Court, YADKIN County. Heard in the Court of Appeals 2 May 1984.

This is an action brought by plaintiff, David A. Henderson, alleging that defendant had discharged him because he filed a workers' compensation claim for work-related injuries.

The jury found in favor of plaintiff and granted him damages in the amount of \$8,000.00. From the judgment entered on the verdict, defendant appealed.

Franklin Smith, for defendant appellant.

Legal Aid Society of Northwest North Carolina, Inc., by Kate Mewhinney, for plaintiff appellee.

JOHNSON, Judge.

On or about 15 May 1978, plaintiff was hired by defendant as a laborer. Within a few days, he was promoted to production inspector. On 17 April 1980, plaintiff pulled a muscle in his left groin area when he lifted a log while inspecting a stack of logs. As a result of this injury, plaintiff was absent from work for several days. When he returned to work about a week later, he suffered severe pain in the injured area and was taken from the job to the hospital where he underwent surgery. Following the surgery, plaintiff remained on sick leave without attempting to return to work until June. In June 1980, plaintiff's doctor permitted him to go back to work with the restriction that he perform light duties only, but defendant refused to assign him to light duties. In August 1980, plaintiff returned to work and was immediately assigned to perform heavy work which exacerbated his injuries. Plaintiff attempted to return to work on five separate occasions between the date of the injury and 2 December 1980, when he was terminated. Each time he was either refused lighter work, or he was given heavy work which resulted in further absences. Meanwhile, plaintiff filed his claims with defendant's workers' compensation insurance carrier, and he received

Henderson v. Traditional Log Homes

several checks before his compensation was discontinued. Plaintiff retained an attorney to pursue his claim, and a hearing before the Industrial Commission was set for January 1981.

On 20 August 1980, plaintiff was told by defendant's general manager that if plaintiff's doctor did not release him soon, he would be replaced. In late November 1980, defendant wrote plaintiff a letter inquiring about the status of his compensation claim. By return mail, plaintiff informed defendant that his claim was pending before the Industrial Commission. Shortly thereafter, plaintiff received a letter from defendant informing him that due to the "down-turn" in the housing market, plaintiff was "laid-off."

At the conclusion of the plaintiff's evidence, the trial court reserved ruling on a motion by defendant for a directed verdict under G.S. 1A-1, Rule 50(a). At the close of all the evidence, defendant moved for and was denied a directed verdict. The jury awarded damages to plaintiff of \$8,000.00. After the jury rendered its verdict, defendant moved for and was denied a motion for judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b). Defendant appealed.

Defendant predicates this appeal upon three assignments of error. In its first and third assignments of error, defendant contends that the trial court erred in denying its motion for a directed verdict and for judgment notwithstanding the verdict. Defendant contends that plaintiff failed to make out a prima facie case of retaliatory discharge under G.S. 97-6.1, and therefore its motions should have been granted.

The ability of an employer to chill an employee's exercise of his rights under the Workers' Compensation Act through retaliatory discharge or demotion motivated our legislature to enact G.S. 97-6.1 which provides in pertinent part:

§ 97-6.1. Protection of claimants from discharge or demotion by employers.—(a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.

Henderson v. Traditional Log Homes

(b) Any employer who violates any provision of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

A cause of action under this section lies only if an employee is discharged or demoted because he exercised his rights under the Workers' Compensation Act. Plaintiff has the burden of proof on the claim of retaliatory discharge or demotion. G.S. 97-6.1(b).

On a motion for a directed verdict under G.S. 1A-1, Rule 50, the question presented is whether the evidence is sufficient to take the case to the jury and to support a verdict for plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E. 2d 678, 680 (1977). The evidence is viewed in the light most favorable to plaintiff, and the plaintiff must be given the benefit of all the reasonable inferences therefrom. *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 374, 301 S.E. 2d 439, 445, *disc. review denied*, 308 N.C. 678, 304 S.E. 2d 759 (1983). Defendant's evidence insofar as it conflicts or refutes the plaintiff's evidence is not considered, but the other evidence presented by defendant may be considered to the extent that it clarifies the plaintiff's case. *Koonce v. May*, 59 N.C. App. 633, 634, 298 S.E. 2d 69, 71 (1982). The motion for directed verdict may be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the plaintiff. If the evidence is such that reasonable minds could differ as to whether plaintiff is entitled to recover, then a directed verdict should not be granted and the case should go to the jury. *Id.* A motion for judgment notwithstanding the verdict is essentially the renewal of a prior motion for a directed verdict. *Harvey v. Norfolk Southern Ry.*, 60 N.C. App. 554, 556, 299 S.E. 2d 664, 666 (1983). Therefore, these rules, regarding the sufficiency of the evidence to go to the jury, are equally applicable to a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict reached by the jury. *Summey v. Cauthen*, 283 N.C. 640, 648, 197 S.E. 2d 549, 554 (1973).

In viewing the evidence in the light most favorable to the plaintiff, the evidence tended to show the following: Plaintiff was

Henderson v. Traditional Log Homes

employed as an inspector by defendant. In April 1980, plaintiff, while in the course of his employment, was involved in an accident wherein he sustained an injury to his left groin area. Plaintiff filed a worker's compensation claim in connection with this injury. When his compensation checks were discontinued after a short time, plaintiff hired an attorney to represent him in connection with this claim. In August 1980, plaintiff returned to work, but was unable to complete a full day because the heavy work aggravated his previous injuries. Following his unsuccessful effort to return to his regular work, plaintiff was told by defendant's general manager that unless his doctor released him soon, he would be replaced. In September 1980, plaintiff again attempted to return to work but his request for light duties was denied. A couple of months later, defendant sent plaintiff a letter requesting an update of his compensation claim. By return mail, plaintiff informed defendant that his claim was pending before the Industrial Commission. Shortly thereafter, plaintiff received a letter informing him that he was "laid-off." At the time of the "lay-off" plaintiff was third in seniority. The other employees "laid-off" at the same time as plaintiff were the last three people to be hired by defendant. Eight other employees with less seniority than plaintiff were retained by defendant. Several weeks after plaintiff was laid-off, one of the other laid-off employees was recalled. Plaintiff was never called back to work by defendant.

The record also reveals that defendant's "supervisors' handbook" listed "seniority" as one of the factors to be considered when determining who should be laid-off. The record further reveals that defendant knew that plaintiff was pursuing his worker's compensation claims, and that his case was scheduled for hearing with the Industrial Commission. There is, also, undisputed evidence in the record that plaintiff was advised by defendant's plant manager to file some of his claims with Blue Cross and Blue Shield instead of the workers' compensation insurance carrier.

Under the rules that we must follow in reviewing the denial of a motion for directed verdict and a motion for judgment notwithstanding the verdict, we hold that there was sufficient evidence to take the case to the jury and to support a verdict for plaintiff. Although there is evidence in the record tending to explain the actions of defendant, we must consider the evidence in

Henderson v. Traditional Log Homes

the light most favorable to plaintiff and accept plaintiff's evidence at face value. The trial court may enter a judgment notwithstanding the verdict only when a directed verdict would have been proper. It would have been error to direct a verdict where, as here, the evidence was of such character that reasonable men could form divergent opinions of its import. *Brewer v. Majors*, 48 N.C. App. 202, 205, 268 S.E. 2d 229, 231, *disc. review denied*, 301 N.C. 400, 273 S.E. 2d 445 (1980). Accordingly, we hold that defendant's first and third assignments of error are without merit.

In its second assignment of error defendant contends that the trial court committed reversible error in its charge to the jury. Defendant contends that the charge was improper and prejudicial in that the jury was instructed to consider such factors as seniority and length of employment in determining whether plaintiff was discharged for exercising his rights under the Workers' Compensation Act. Rule 10(b)(2) of the Rules of Appellate Procedure provides in part:

(2) Jury Instructions; Findings and Conclusions of Judge.

No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. *In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference.* (Emphasis ours.)

The exceptions supporting this assignment of error refer the appellate court to every transcript page of the jury charge. Defendant fails to clearly identify the objectionable portions by setting them within brackets or by any other clear means of reference; therefore, the alleged error in the jury charge is not present for consideration on appeal. *State v. Melvin*, 32 N.C. App. 772, 774, 233 S.E. 2d 636, 638 (1977). Nevertheless, we have examined the charge in its entirety and find it free from prejudicial error.

Having considered all of defendant's assignments of error and finding them to be without merit, we hold that the parties herein received a fair trial, free of prejudicial error.

Servomation Corp. v. Hickory Construction Co.

No error.

Judges WELLS and BECTON concur.

SERVOMATION CORPORATION, PLAINTIFF v. HICKORY CONSTRUCTION COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF v. MILLER-BROOKS ROOFING COMPANY, THIRD PARTY DEFENDANT

No. 8325SC1012

(Filed 4 September 1984)

Arbitration and Award § 2— waiver of arbitration

Defendant by its conduct waived its contractual right to arbitration when it filed an answer and a third party complaint for indemnity, submitted interrogatories to plaintiff, and moved only in the alternative for an order staying the legal action and compelling plaintiff to arbitrate.

APPEAL by defendant Hickory Construction Company from *Walker, Russell G., Jr., Judge*. Judgment entered 24 June 1983 in Superior Court, CATAWBA County. Heard in the Court of Appeals 7 June 1984.

Defendant Hickory Construction Company, a general contractor, built a warehouse and office facility for plaintiff and in doing so subcontracted the roofing part of the construction to the third party defendant, Miller-Brooks Roofing Company, which concern is not involved in this appeal. The construction was substantially completed in November, 1975 when plaintiff occupied the building, though final payment on the contract was not made until 26 March 1976. The roof began to leak in early 1979 and upon being notified by plaintiff defendant took corrective measures, but without success. In February, 1981 plaintiff notified the architect of the problem, but it still was not corrected. In May, 1981 plaintiff had the roof examined by an independent engineering testing company, which reportedly found that the roofing materials and installation were defective. This suit for damages allegedly resulting from the claimed defects was filed on 19 March 1982. In its answer filed 28 April 1982 defendant pled several defenses, including plaintiff's initial failure to channel its complaints through the architect and its subsequent failure to submit the dispute to

Servomation Corp. v. Hickory Construction Co.

arbitration, both of which the contract required. Defendant also filed a third party complaint for indemnity against its subcontractor, and served numerous interrogatories on plaintiff, which were answered on 1 October 1982. On 4 May 1983 defendant moved for summary judgment based on its statute of limitations defense and on certain contractual limitations, and in the alternative also moved for an order staying the legal action and compelling plaintiff to arbitrate. From the judgment denying these motions, defendant appeals.

Rudisill & Brackett, by Keith T. Bridges, for plaintiff appellee.

Patrick, Harper & Dixon, by Stephen M. Thomas, for defendant appellant Hickory Construction Company.

PHILLIPS, Judge.

The central issue presented by this appeal is whether the trial court erred in refusing to direct plaintiff to seek arbitration and to stay the lawsuit pending the conclusion thereof. We preliminarily note that an order denying arbitration, though interlocutory, is appealable immediately because it involves a substantial right that might be lost if appeal is delayed until the lawsuit is concluded. *Sims v. Ritter Construction, Inc.*, 62 N.C. App. 52, 302 S.E. 2d 293 (1983).

The contract between the parties contains the American Institute of Architects Document A201, entitled "General Conditions of the Contract for Construction," several provisions of which relate to settling claims and disputes thereunder. Article Two provides that any matters in dispute between the contractor and the owner relating to execution or progress of the work or interpretation of the contract shall be initially referred to the architect, and that any matter so referred, except those relating to artistic effect, "shall be subject to arbitration upon the written demand of either party," once the architect has rendered, or has had a reasonable time to render, a written decision. Article Seven provides that "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof . . ." subject to certain exceptions not here applicable, "shall be decided by arbitration . . . unless the parties mutually agree otherwise." This section also sets out the procedure for obtaining

Servomation Corp. v. Hickory Construction Co.

arbitration. Finally, A201 provides that duties, obligations, rights, and remedies imposed or available pursuant to the contract shall be "in addition to and not a limitation of" any imposed or available by law.

Although G.S. 1-567.3(a) and (d) authorize the court to stay litigation and compel arbitration where parties have contracted to arbitrate their disputes, the right to arbitrate, as other contract rights, "may be impliedly waived through the conduct of a party to the contract clearly indicating such purpose." *Adams v. Nelsen*, 67 N.C. App. 284, 287, 312 S.E. 2d 896, 899 (1984). The contract between plaintiff and defendant provided for mandatory arbitration of disputes thereunder, and the question is whether defendant's participation in the lawsuit in the manner and to the extent shown by the record constituted a waiver of its right to enforce the agreement to arbitrate. In *Cyclone Roofing Co. v. LaFave Co.*, 67 N.C. App. 278, 312 S.E. 2d 709 (1984), this Court found that defendant had waived arbitration as a matter of law by participating in that lawsuit considerably less than defendant participated in this one. In that case, defendant's participation consisted only of invoking the court's jurisdiction by filing a permissive cross-claim and demanding a jury trial both on plaintiff's claim and its cross-claim. In this case, however, in addition to filing an answer and third party complaint for indemnity, defendant submitted some 61 interrogatories to plaintiff, many of which had numerous sub-questions, all of which were answered by plaintiff before defendant moved for a stay. Furthermore, the stay motion was not even filed until more than a year after the suit was filed, and then did not demand arbitration straight out, but rather requested it "in the alternative," in the event summary judgment on the other defenses was denied. All this conduct was inconsistent with the right to immediately require arbitration and, in our opinion, waived the right as a matter of law. We note that under the rule laid down in some of the federal cases, which was endorsed by the dissenting opinion in *Cyclone Roofing Co. v. LaFave Co.*, *supra*, participating in litigation is not deemed to waive arbitration unless the opposing party has been prejudiced thereby. See *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F. 2d 329 (4th Cir. 1971); *Siam Feather, Etc. v. Midwest Feather Co.*, 503 F. Supp. 239 (S.D. Ohio 1980). But even under that rule, defendant's participation in this lawsuit clearly waived its arbitra-

Servomation Corp. v. Hickory Construction Co.

tion rights, since it obtained much information from plaintiff, to the latter's manifest detriment, through its extensive use of discovery.

Defendant also argues that the trial court erred in refusing to grant summary judgment based on its statute of limitations defense, and contends that the breach of contract action was not filed within three years after it accrued. Although an order denying summary judgment is interlocutory and hence not normally appealable unless a substantial right of one of the parties is affected, we exercise our discretion to review this part of the order also. This action was filed on 19 March 1982. Our examination of the record and briefs shows that the only theory on which defendant could potentially succeed on this defense is that the cause of action accrued upon the roof first leaking in 1979; which we think is untenable, at least on this record, since nothing else appearing the law does not encourage unnecessary litigation by expecting parties to sue general contractors under a building contract simply because a leak in the roof occurs. But even if we accept the view that the cause of action accrued when the plaintiff first became aware of the roof leak, the record does not support defendant's claim that it is barred by the statute of limitations. First, the record does not clearly establish that the complaint was filed more than three years after the roof leak was first discovered; it only indicates that a leak was discovered "in 1979" and the complaint was filed on 19 March 1982. Second, according to such evidence as is recorded, defendant was estopped by its conduct from maintaining that the cause of action accrued upon the leak being discovered. Because there is uncontradicted evidence in plaintiff's response to defendant's interrogatories that upon being notified of the leak in March, 1979, defendant represented that it would get back in touch with plaintiff when they "found the roofing bond or what the problem was," but had not done so, and that the corrective measures thereafter attempted by defendant and the subcontractor were without success. Equity will deny the right to assert the statute of limitations defense "when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Nowell v. The Great Atlantic & Pacific Tea Co.*, 250 N.C. 575, 579, 108 S.E. 2d 889, 891 (1959). And under the circumstances presented plaintiff had a right to rely upon defendant

Schuman v. Roger Baker and Assoc.

doing what it represented would be done, and to defer going to court during the interim. Needless to say, perhaps, our decision is based on the record as it now stands, and beyond that we do not speculate.

Affirmed.

Judges WEBB and JOHNSON concur.

JACK L. SCHUMAN AND WIFE, JEAN O. SCHUMAN; LEONARD LAUFE AND WIFE, SYMOINE LAUFE; HARVEY MANN AND WIFE, RHODA MANN v. ROGER BAKER AND ASSOCIATES, INC., A NORTH CAROLINA CORPORATION (FORMERLY KNOWN AND ENTITLED AS ROGER BAKER, INC.); ROGER J. BAKER; CHARLES G. BEEMER, TRUSTEE; ROBERT EPTING, TRUSTEE; THE NORTHWESTERN BANK, A NORTH CAROLINA BANKING CORPORATION; AND FRANKLIN PARK LIMITED PARTNERSHIP

No. 8315SC772

(Filed 4 September 1984)

Estoppel § 1; Registration § 4—deeds of trust—priority from registration—no estoppel by deed

Where plaintiffs' debtor did not acquire and register its title until one month after the execution of its deed of trust to plaintiffs, a deed of trust to a bank registered after the debtor acquired title had priority over plaintiffs' deed of trust under G.S. 47-20, and actual notice by the bank of plaintiffs' prior deed of trust did not operate to defeat the bank's statutory priority under the doctrine of estoppel by deed.

APPEAL by plaintiffs from *Barnette, Judge*. Judgment entered 24 March 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 2 May 1984.

Roger Baker, a developer, undertook to arrange financing for an office condominium in Chapel Hill. He attempted without success to obtain bank financing for both land acquisition and construction, but could only obtain non-binding commitments for construction loans, contingent in Northwestern Bank's (hereinafter "Northwestern") case upon his securing investors to finance purchase of the land. Baker then sought private investors, and obtained loans totalling \$200,000 from plaintiffs. Plaintiffs received

Schuman v. Roger Baker and Assoc.

promissory notes from Roger Baker, Inc., the corporation actually running the project, and Roger Baker, Inc. executed a deed of trust in their favor on the subject property. At the time of execution, Roger Baker, Inc. did not hold title to the subject property. The deed of trust was duly recorded on 19 September 1980; it contained an agreement by plaintiffs to subordinate their deed of trust to a planned subsequent construction loan, and empowered the trustee to execute the requisite documents. The subject property was conveyed to Baker personally, *not* to Roger Baker, Inc., by deed recorded the same day. The subject property was transferred from Baker personally to Roger Baker, Inc. in October 1981. Plaintiffs never re-recorded their deed.

On 26 January 1981, Roger Baker & Associates, Inc. (a successor corporation to Roger Baker, Inc.) executed a promissory note in favor of Northwestern for \$1,000,000. The note was secured by a deed of trust on the subject property which was recorded 29 January 1981. The trustee on plaintiffs' deed of trust executed an agreement subordinating that deed to Northwestern's deed on 5 February 1981. Thereafter, Roger Baker & Associates, Inc. failed to make payments to plaintiffs as promised. Plaintiffs instituted the present action in February 1982, seeking among other relief to have the subordination agreement set aside and to enforce their notes against the subject real property. Roger Baker & Associates, Inc. obtained removal to the United States Bankruptcy Court; that Court later remanded parts of the action to the Superior Court for determination. Northwestern thereupon properly moved for and obtained summary judgment on all claims against it. Plaintiffs appeal.

Newsom, Graham, Hedrick, Bryson, Kennon & Faison, by Joel M. Craig, for plaintiff appellants.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by David F. Meschan and Henry B. Mangum, Jr., for defendant appellee.

JOHNSON, Judge.

The trial judge certified that there was no just reason for delay in entering judgment for Northwestern. Therefore, this appeal is properly before this Court. G.S. 1A-1, Rule 54(b).

Although the facts outlined above appear complicated, the resolution of the controversy on this appeal depends quite simply

Schuman v. Roger Baker and Assoc.

on the application of our recording statute for deeds of trust, G.S. 47-20. This statute is virtually identical to the statute governing outright conveyances, G.S. 47-18, and the two are construed alike. *Francis v. Herren*, 101 N.C. 497, 8 S.E. 353 (1888). These statutes provide in essence that the party winning "the race to the court house" will have priority in title disputes. See J. Webster, *Real Estate Law in North Carolina* § 331 (1971).

It is evident in the present case that Northwestern "won the race" to the court house and has priority under the statute. Roger Baker, Inc., plaintiffs' grantor, did not acquire and register its title until one month after the execution of the deed of trust to plaintiffs. Plaintiffs do not argue that recordation of the earlier grant to Baker individually constituted substantial compliance with the statute, nor does such an argument appear to have support in the case law. See *McKnight v. M. & J. Finance Corp.*, 247 F. 2d 112 (4th Cir. 1957) (chattel mortgage in the name of corporate president insufficient against corporation). Therefore, the plaintiffs' deed of trust lay outside of Roger Baker, Inc.'s chain of title. Northwestern, in examining title for purposes of its agreement with the successor Roger Baker & Associates, Inc., was not required to search outside its line of title. See *Morehead v. Harris*, 262 N.C. 330, 137 S.E. 2d 174 (1964) (focusing solely on links in title chain); *Hege v. Sellers*, 241 N.C. 240, 84 S.E. 2d 892 (1954) (covenant not in direct line of title ineffective); *Maddox v. Arp*, 114 N.C. 585, 19 S.E. 665 (1894) (purchaser need only follow "up the stream of title"). Therefore, Northwestern had no notice of plaintiffs' deed under the law and should prevail.

Our inquiry would ordinarily end there. However, plaintiffs assert that since Northwestern had actual notice of the prior deed of trust, the doctrine of estoppel by deed operates to estop it from denying plaintiffs' earlier deed. In *Door Co. v. Joyner*, 182 N.C. 518, 109 S.E. 259 (1921), our Supreme Court, while recognizing the doctrine of estoppel by deed, held that a subsequent purchaser with neither actual nor constructive notice had superior title by virtue of his prior registration. The Court, plaintiffs argue, left unanswered the question of whether actual notice to the subsequent purchaser would defeat the statutory priority. They accordingly urge the application of estoppel by deed as grounds for reversal.

Schuman v. Roger Baker and Assoc.

We note first that the leading commentator interprets *Door Co. v. Joyner* otherwise. See Webster, *supra*, § 341 at 427. We agree, believing that Webster's interpretation, that even actual notice of a prior deed will not defeat prior registry, better expresses the policies embodied in the law. Therefore, plaintiffs' argument must fail.

Our Supreme Court has repeatedly held that no notice, however full or formal, will supply the want of registration of a deed. *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E. 2d 769 (1965); *Dulin v. Williams*, 239 N.C. 33, 79 S.E. 2d 213 (1953). These cases, read (1) with those cases limiting the duty to search to the chain of title, see *Morehead v. Harris*, *supra*, (2) with those cases making registration of deeds defective as to material particulars ineffective, see *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713 (1929), and (3) with the statutory recording and indexing requirements, see G.S. 47-20.1 (same county); G.S. 161-14.2 *et seq.*, clearly indicate that registration outside the chain of title has the same effect on notice as no registration. Plaintiffs, although they apparently alleged fraudulent conduct by Northwestern in their complaint, forecast no such evidence nor do they argue any fraud on Northwestern's part before this Court. Therefore, any actual notice to Northwestern is insufficient to supply the want of proper registration.

We are aware that our Supreme Court has recently stated that "Our registration statute does not protect all purchasers, but only innocent purchasers for value." *Hill v. Memorial Park*, 304 N.C. 159, 165, 282 S.E. 2d 779, 783 (1981). However, this statement in *Hill* referred to situations in which a separate official notice of litigation had been served on the purchasers or notice of *lis pendens* had been filed. The cases cited in *Hill* to support the quoted statement both involved *lis pendens* notice. See *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E. 2d 162 (1974); *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E. 2d 129 (1945). The means of constructive or actual notice discussed in *Hill* are statutorily mandated, formal means of notice of litigation; we do not read them to extend to other less formal means of notice. Therefore, we hold that Northwestern is not estopped to deny plaintiffs' title.

The policy behind the recording statutes supports our conclusion. The General Assembly, by enacting these laws, clearly in-

State v. Edwards

tended that prospective purchasers should be able to safely rely on the public records. See *Hayes v. Ricard*, 245 N.C. 687, 97 S.E. 2d 105 (1957); *Clark v. Butts*, 240 N.C. 709, 83 S.E. 2d 885 (1954). To adopt plaintiffs' position would require prospective purchasers to search outside the chain of title in every case, and thus inject a new element of uncertainty into the process, contrary to this longstanding policy. We note also the recent adoption of G.S. 47-20.5, which requires that after-acquired property clauses in security agreements be extended or re-recorded after each subsequent purchase of real property. This indicates a legislative insistence that due recordation *in the chain of title* must remain the only effective means of protecting title.

Accordingly, we conclude that Northwestern has shown a complete defense as a matter of law. The summary judgment in its favor was properly granted and must be

Affirmed.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. MATTHEW EDWARDS, JR.

No. 8314SC1090

(Filed 4 September 1984)

1. Searches and Seizures § 41— execution of search warrant—knock and announce requirements—forcible entry

Officers executing a warrant to search defendant's apartment for cocaine complied with the knock and announce requirements of G.S. 15A-249 where they knocked on the door and announced in a loud, authoritative voice that they were the police with a search warrant; further, the authority of the officers under G.S. 15A-251 forcibly to enter the premises was established by proof that approximately 30 seconds went by without a response to the officers' knock and announcement, since a 30 second wait was sufficient where instantly disposable contraband was involved.

2. Searches and Seizures § 39— search warrant—time of execution

A search of defendant's apartment for cocaine pursuant to a warrant was not unreasonable because it was accomplished at night where the search was made at night because traffic into and out of the apartment had been heavier at night, and the officers needed the cover of darkness to approach the apartment without detection.

State v. Edwards

3. Criminal Law § 91 — withdrawal of no contest plea — adding case to trial calendar

Where defendant entered a plea of no contest and was scheduled to be sentenced on a certain date, defendant's case did not appear on the calendar listing cases to be tried at that session, and defendant was permitted to withdraw his no contest plea when his case was called for sentencing, the prosecutor did not violate G.S. 7A-49.3 when he added defendant's case to the trial calendar and began the trial the next day. Further, defendant failed to show that he was prejudiced by the trial of his case at such time because of the absence of an expert witness where the record did not show when the witness could have testified or what his testimony would have been.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 20 May 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 8 May 1984.

Defendant was tried for and convicted of level two trafficking in cocaine, in violation of G.S. 90-95(h)(3)(b). He was sentenced to fourteen years in prison and fined \$100,000.

The State's evidence indicated that: After receiving information from a confidential informant that defendant was in possession of a large quantity of cocaine in his duplex apartment at 819 Arnette Avenue in Durham, Durham Public Safety Officer E. J. Kolbinsky arranged for the informant to purchase cocaine from defendant; and less than 72 hours after the controlled buy was made, Kolbinsky obtained a warrant to search the apartment involved. The warrant was issued at 10 o'clock at night on 30 July 1982, and was executed about 45 minutes later. When Kolbinsky and other officers arrived at the duplex, an officer knocked on the storm door, which was locked, and announced in a loud, authoritative voice, "police have a search warrant, open the door." After approximately 30 seconds went by without the knock being answered, the officers forced open the storm door and the wooden front door and entered the apartment. There they found defendant dressed in a bathrobe, several other persons, over 200 grams of a white powdery substance later determined to contain cocaine, a receipt made out to "Matthew Edwards" for paying the cable television bill for the residence, a pistol, which defendant said belonged to his daughter, and several items commonly used in the illicit drug trade, including a set of scales. Defendant was placed under arrest and the items found in the search were seized by the police.

State v. Edwards

During the pre-trial stage defendant moved to suppress the evidence seized during the search, but this motion was denied. In a bargain with the State, defendant then pleaded no contest to a lesser included offense and was scheduled to be sentenced on 18 May 1983. On that day, when the case was called for sentencing, defendant moved, in open court, to withdraw his plea on the ground that it was not voluntarily entered, and the motion was granted. Over defendant's objection, his trial began the next day.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Loflin & Loflin, by Thomas F. Loflin III, Alexander Charns, Michelle F. Robertson and Dean A. Shangler, for defendant appellant.

PHILLIPS, Judge.

The two main questions presented by this appeal are whether the evidence seized when defendant was arrested should have been suppressed because the search violated either North Carolina law or the United States Constitution, and whether defendant was legally prejudiced by his case being tried when it was, though it had been scheduled for sentencing, rather than trial. We answer both these questions in the negative and hold that defendant's trial was without reversible error.

[1] One ground for nullifying the search of his premises that defendant asserts is that the search violated the provisions of G.S. 15A-249 and G.S. 15A-251. This argument has no support in the record. G.S. 15A-249 requires an officer executing a search warrant, before entering the premises, to "give appropriate notice of his identity and purpose," and "[i]f it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present." And G.S. 15A-251 authorizes an officer that has given the notice required by G.S. 15A-249 and who "reasonably believes either that admittance is being denied or unreasonably delayed or that the premises . . . is unoccupied" to break and enter the premises involved when necessary to execute the warrant. The only evidence presented at the suppression hearing supports the court's conclusion that the officers involved complied with both of these statutes. Their compliance with G.S. 15A-249 was

State v. Edwards

shown by evidence that the officers knocked on the door and announced in a "loud, authoritative" voice that they were police with a search warrant. And their authority to forcibly enter the premises, under G.S. 15A-251, was established by proof that after having given the notice required by G.S. 15A-249, no response was made to their knock and "loud, authoritative" announcement for about 30 seconds. Such a delay, under the circumstances, warranted the officers in believing that their entry to the premises was either being denied or unreasonably delayed and thus justified their entry by force. What is a reasonable time between notice and entry depends on the particular circumstances in each case. *State v. Gaines*, 33 N.C. App. 66, 234 S.E. 2d 42 (1977). In this case, since the object of the search was a quantity of powdery contraband peculiarly susceptible to being almost instantly disposed of, we hold that the 30-second wait that occurred after giving notice was both sufficient and reasonable.

[2] The defendant's main ground for contending that the search was unreasonable, and thus forbidden by the Fourth Amendment to the United States Constitution, is that the search was accomplished at night. That the place searched was a home and the search was made at night are certainly factors to be considered in determining the reasonableness of a search. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, *reh. denied*, 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971). But those are not the only factors that require consideration; the nature of the alleged contraband searched for, the traffic generated by it, and the times and places it is handled by criminals are also factors to be considered. The search in this instance was made at night, so the officer testified, because the traffic into and out of the duplex had been heavier at night, and the officers needed the cover of darkness in approaching the residence, lest news of their presence in the neighborhood reach the defendant and others in the house before the search could be attempted. These are good and sufficient reasons for conducting a search for criminal contraband at night, in our opinion, and under the circumstances we believe the search was reasonable and well within constitutional standards. Those who conduct criminal operations at night have no constitutional right to be searched only in daylight.

[3] With respect to Judge McLelland's refusal to postpone the trial after granting defendant's motion to withdraw his no contest

State v. Edwards

plea, the record shows the following: Defendant was indicted on 7 September 1982. On 20 September 1982 defendant waived arraignment and entered a plea of not guilty. On 18 November 1982 an order was entered permitting defendant's expert chemist, Dr. Robert Shapiro of Harrisonburg, Virginia, to independently test a sample of the substance seized when defendant was arrested. On 21 March 1983 defendant's motion to suppress was filed. His case was scheduled to be tried 18 April 1983; but defendant's motion to suppress was heard and denied that day, after which defendant pled no contest to a lesser charge and he was scheduled to be sentenced on 18 May 1983. Prior thereto a trial calendar was duly filed listing the cases to be tried at that session and defendant's case was not on it. When defendant's case was called for sentencing on 18 May 1983, he orally moved to withdraw his no contest plea and was permitted to do so upon evidence not brought forward in the record. That same afternoon at 4:55 o'clock, the District Attorney announced that defendant's case was being added to the trial calendar and trial would begin the next morning at 9:30. Defendant objected on the grounds that the case was not on the trial calendar for that week as required by G.S. 7A-49.3, and that trying the case on such short notice would deprive him of his constitutional right to present witnesses. Upon counsel contending that Dr. Shapiro's testimony was essential to the defense of the case and that Dr. Shapiro could be in court upon seven days' notice, Judge McLelland asked if the witness could appear on shorter notice, and defense counsel responded, "I just don't know until I can talk to him." Thereafter the record is silent as to Dr. Shapiro. In particular it contains no report of Dr. Shapiro being contacted again or the result thereof, and contains no indication of what Dr. Shapiro's testimony would have been if he had appeared. Defendant argues that since his case was on the sentencing calendar, rather than the trial calendar, it was a violation of G.S. 7A-49.3 for his case to be called for trial that week. That statute does require the District Attorney to file a calendar of cases he intends to call for trial at each court session; but it also expressly provides that a case docketed after the calendar is filed can be called for trial at the District Attorney's discretion. Since the District Attorney did not know when the calendar was made up that defendant's case would be returned to the trial docket because of defendant's change of plea, we see no violation of the statute in the case being added to the 19 May 1983 trial calendar

Howell v. Treece

as it was. And since the record does not show when, if at all, Dr. Shapiro could have testified or what his testimony would have been, no error by the court or prejudice to the defendant has been shown. For a new trial to be ordered, both error and prejudice must be shown. *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617 (1968). Defendant has failed to show either.

The eleven other arguments made by defendant relate to the admissibility of various testimony and exhibits, the sufficiency of the evidence to support the indictment, and the judge's instructions to the jury. All these arguments have been carefully considered, and in our opinion none have merit or warrant further discussion.

No error.

Judges HEDRICK and ARNOLD concur.

ANNIE SMITH HOWELL v. J. C. TREECE, JR. AND WIFE, MARGIE TREECE,
AND RICHMOND COUNTY

No. 8320SC1141

(Filed 4 September 1984)

1. Taxation § 40— sale of tax lien—failure to give sufficient notice

The evidence supported the jury's verdict finding that Richmond County failed to provide notice at plaintiff's last known address as required by G.S. 105-375 for the sale of a tax lien under in rem foreclosure procedures where the evidence tended to show that plaintiff bought land in Richmond County in 1976 and immediately conveyed a portion thereof to a resident of Dillon, South Carolina; each deed showed plaintiff to be a resident of Williamsburg County, South Carolina; plaintiff failed to list her land for taxes, and it was listed by an employee in the county tax supervisor's office; the tax supervisor's office had copies of the deeds to and from plaintiff which showed her to be a resident of South Carolina; when the employee listed plaintiff's property for taxes, she listed plaintiff's address as Ellerbe, North Carolina, which was the town nearest to the property; the county tax collector sent tax notices to plaintiff in 1977 and 1978 addressed to Ellerbe, North Carolina; all notices mailed to plaintiff at Ellerbe, North Carolina, by registered and certified mail, were returned marked "addressee unknown"; and the tax collector's office checked the Ellerbe telephone book and county automobile registration to determine if plaintiff was listed in either, but no check was made with the Register of

Howell v. Treece

Deeds Office and no attempt was made to determine if plaintiff's grantor or grantee knew plaintiff's address.

2. Taxation § 40— tax foreclosure proceeding— absence of notice— action to invalidate— statute of limitations

Where plaintiff did not receive the required statutory notice of in rem tax foreclosure proceedings which culminated in a sale of plaintiff's land to defendants, no statute of limitations could bar plaintiff's action to invalidate the sale.

APPEAL by defendants Treece from *Seay, Thomas W., Judge*. Judgment entered 30 June 1983 in RICHMOND County Superior Court. Heard in the Court of Appeals 27 August 1984.

Plaintiff brought this action to remove a cloud on her title to property in Richmond County. In 1976 plaintiff acquired 181.1 acres of land in Richmond County. Immediately upon the acquisition of the property, plaintiff conveyed all but 81 acres of the property to third parties. Plaintiff never listed the property for tax purposes. In 1977 the Richmond County Board of Commissioners levied ad valorem taxes on the property. A bill was mailed to plaintiff at the post office nearest the property. Plaintiff failed to pay the taxes. A lien attached to the property and Richmond County proceeded in the in rem method of foreclosure. The lien was sold to Richmond County for \$76.54, the amount of the 1977 taxes plus penalties, interest and costs. On 2 July 1979 a judgment was filed in the office of the clerk of superior court for Richmond County. On 17 January 1980, execution was issued against plaintiff.

On 28 March 1980 the Richmond County Sheriff sold the property valued at \$40,000.00 to defendant J. C. Treece, Jr. for \$125.24. On 15 April 1980 the sheriff executed a deed to J. C. Treece, Jr. This deed was recorded on 30 April 1980 in the Richmond County Registry. On 4 January 1982 plaintiff filed this action. The case was tried at the 20 June 1983 Civil Session of Richmond County Superior Court. The court submitted two issues to the jury. The issues and the answers were:

1. Did the defendant, Richmond County, fail to comply with the statutory requirements for the "in rem foreclosure" on the 81 acre tract located in Black Jack Township, as alleged in the Complaint?

Answer: Yes.

Howell v. Treece

2. Is the plaintiff, Annie Smith Howell, entitled to the ownership of the 81 acre premises free and clear of the claim of the defendants, J. C. Treece, Jr. and wife, Margie Treece?

Answer: Yes.

On the jury's verdict, the trial court entered judgment voiding the sheriff's deed and ordering the deed set aside, and declaring plaintiff to be the owner of the 81 acre tract. From this judgment, defendants Treece have appealed.

Robert E. Little, III and Leath, Bynum, Kitchin & Neal, P.A., by Timothy C. Barber and Fred W. Bynum, Jr., for plaintiff.

Pittman, Pittman & Dawkins, P.A., by Donald M. Dawkins, for defendants.

WELLS, Judge.

Defendants contend the trial court erred by failing to dismiss plaintiff's complaint for failure to file her complaint within the time prescribed by N.C. Gen. Stat. § 105-377 (1977), by admitting irrelevant evidence, by denying defendants' motions for a directed verdict and for a verdict notwithstanding the verdict and by the entry of the judgments. We disagree with defendants' contentions and find no error.

[1] Defendants' motion for a directed verdict and for judgment N.O.V. challenge the sufficiency of the evidence to support the jury's verdict. Plaintiff bottomed her case on the failure of the county to provide the notice required under the in rem foreclosure procedures provided for sales of tax liens under pertinent provisions of N.C. Gen. Stat. § 105-375 (1973). The pertinent parts of that statute require notice of the proceedings to the defaulting taxpayer by registered or certified letter, return receipt requested, to the taxpayer's "last known address." Thus, we focus on the evidence as it relates to the county's actions with respect to this notice requirement. Plaintiff presented evidence consisting of her own testimony and exhibits, and the testimony of Nancy Raines and Margaret Fountain.

Plaintiff testified that she bought 181.1 acres of timber land in Black Jack Township, Richmond County in December of 1976. The land was transferred to plaintiff by warranty deed dated 16

Howell v. Treece

December 1976, from James A. Leak Company, Inc., a North Carolina Corporation and James A. Leak, Trustee of Anson County, North Carolina as grantors, to Annie Smith Howell, of Williamsburg County, South Carolina, as grantee. The deed was duly recorded in the Richmond County Registry on 17 December 1976. Plaintiff immediately deeded 100 acres of the property to Lewis C. Reese of Dillon, South Carolina. At the time plaintiff acquired the property and at all times since, plaintiff resided in Andrews, Williamsburg County, South Carolina. Plaintiff never had a mailing address in Ellerbe, North Carolina. Plaintiff never listed her property for taxes in Richmond County. Plaintiff first learned that her property had been sold for taxes when she attempted to obtain a loan against the property in May of 1981. Prior to then, plaintiff had no notice of the tax lien against her property.

Nancy Raines testified that she had been employed in the Richmond County Tax Supervisors Office for 11 years, where she was in charge of property transfers and tax billings. It was her responsibility to check real property records in the Register of Deeds Office to determine whether property was properly listed for taxes. The Register of Deeds sends copies of all recorded deeds to the Tax Supervisors Office. When property is not listed, her office makes a listing from the deeds. Her office had a copy of plaintiff's deed from Leak Company and Leak, Trustee. Her office also had a copy of plaintiff's deed to Mr. Reese. Each deed showed plaintiff to be a resident of Williamsburg County, South Carolina. When she listed plaintiff's property for taxes, she listed plaintiff's address as Ellerbe, North Carolina. Her reason for using the Ellerbe address was that "[w]hen we don't have an address and they don't come in to list, we put the town that the township on our deed recorded." Ellerbe is in Black Jack and Mineral Springs Townships. In assigning the Ellerbe address to plaintiff, she made no other effort to ascertain plaintiff's address. Plaintiff never listed her property for taxes.

Margaret Fountain testified that she had been the Richmond County Tax Collector since 1977 and that her office sent out tax notices to plaintiff in 1977 and 1978 addressed to Ellerbe, North Carolina. That address was used because it was the address on the tax bills and the tax listing. All notices mailed to plaintiff at Ellerbe, North Carolina, by registered and certified mail, were returned marked "addressee unknown." This information in-

Howell v. Treece

licated that plaintiff did not live in Ellerbe. Her office checked the Ellerbe telephone book and county automobile registration to determine if plaintiff was listed in either. No check was made with the Register of Deeds Office. No attempt was made to determine if plaintiff's grantor knew plaintiff's address. No check was made to determine if Mr. Reese knew plaintiff's address. No check was made with tax authorities in Williamsburg County, South Carolina to determine if they knew plaintiff's address.

We hold that the foregoing evidence clearly shows that the notices required under G.S. § 105-375 were not sent to plaintiff's last known address and clearly supports the jury's verdict. *See Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979); *Annas v. Davis*, 40 N.C. App. 51, 252 S.E. 2d 28 (1979).

[2] Defendants also contend that plaintiff's action was barred under G.S. § 105-377, which provides:

Notwithstanding any other provisions of law prescribing the period for commencing an action, no action or proceeding shall be brought to contest the validity of any title to real property acquired by a taxing unit or by a private purchaser in any tax foreclosure action or proceeding authorized by this Subchapter or by other laws of this State in force at the time the title was acquired, nor shall any motion to reopen or set aside the judgment in any such tax foreclosure action or proceeding be entertained after one year from the date on which the deed is recorded.

We must reject this argument. In *Comrs. of Roxboro v. Bumpass*, 233 N.C. 190, 63 S.E. 2d 144 (1951), our supreme court stated the rule in cases such as the one now before us, as follows:

Notice and an opportunity to be heard are prerequisites of jurisdiction . . . and jurisdiction is a prerequisite of a valid judgment. . . . The Legislature is without authority to dispense with these requirements of due process, and lapse of time cannot satisfy their demands. No statute of limitations, therefore, can bar the right of a litigant to assert that he is not bound by a judgment entered in a cause of which he had no legal notice. [Citations omitted.]

Watson v. Storie

Plaintiff in this case having not received the required statutory notice of the in rem foreclosure proceedings which culminated in the sale to defendants, plaintiff's action was not barred.

We have examined and considered defendants' other assignments of error, find them to be without merit, and overrule them.

No error.

Chief Judge VAUGHN and Judge HEDRICK concur.

MARIE WATSON, ADMINISTRATRIX OF THE ESTATE OF HOBART WATSON, DECEASED
v. ROBERT R. STORIE

No. 8325SC1140

(Filed 4 September 1984)

1. Automobiles and Other Vehicles § 94.8— continuing to ride with defendant— failure to remonstrate—contributory negligence—insufficient evidence

The evidence was insufficient to permit a jury finding that decedent was contributorily negligent in continuing to ride with defendant or in failing to remonstrate with defendant where the record was devoid of evidence tending to show that plaintiff was aware, or in the exercise of due care should have been aware, of negligent behavior on the part of defendant or that plaintiff had an opportunity to remonstrate with defendant prior to the accident; the record contained no evidence tending to show that plaintiff did not in fact so remonstrate; and there was no evidence that defendant's ability to operate the vehicle at the time of the accident was in any way impaired by beer he had consumed two hours earlier.

2. Automobiles and Other Vehicles § 94.8— failure to remonstrate with driver— evidence too remote

Testimony that defendant was driving "too fast and weaving" some seven hours prior to the accident in question was too remote to raise an inference of contributory negligence by decedent in failing to remonstrate with defendant driver.

3. Appeal and Error § 62— error relating to contributory negligence— new trial— retrial of negligence issue

When the appellate court remanded the case for a new trial because of an error in the instructions with respect to contributory negligence, the trial court did not err in retrying the issue of defendant's negligence since the issues of negligence, contributory negligence and damages were so inextricably interwoven that a new trial on all issues was required.

Watson v. Storie

APPEAL by plaintiff from *Saunders, Judge*. Judgment entered 24 June 1983 in Superior Court, CALDWELL County. Heard in the Court of Appeals 27 August 1984.

This is a civil action wherein plaintiff, administratrix of the estate of her deceased husband, Hobart Watson, seeks to recover damages for the wrongful death of her intestate allegedly resulting from the negligence of defendant. Evidence introduced at trial tended to show the following:

On 17 September 1979, shortly before noon, plaintiff's intestate, his son and daughter, defendant, and two other people set out in a pickup truck for a rural area approximately fifteen miles away. All four men were drinking alcoholic beverages. Decedent's son and daughter got out of the truck before it reached its destination. Decedent's daughter testified that she got out of the truck because defendant, driver, "was going too fast and weaving past cars." On the return trip, some eight hours later, the truck hit loose gravel and defendant, driver, lost control of the vehicle, which hit an embankment. Plaintiff's intestate was injured in the accident and died approximately thirty-five hours later. Plaintiff subsequently filed this wrongful death action, first tried before a jury in October 1981. Plaintiff appealed to this Court from a jury verdict finding defendant negligent and plaintiff's intestate contributorily negligent, and in an opinion reported at 60 N.C. App. 736, 300 S.E. 2d 55 (1983), this Court awarded plaintiff a new trial for error committed by the trial judge in charging the jury. On 20 June 1983 the case was again tried before a jury, which again returned a verdict finding defendant negligent and plaintiff's intestate contributorily negligent. Plaintiff appealed.

West, Bingham, Delk & Swanson, by Ted G. West, for plaintiff, appellant.

Todd, Vanderbloemen and Respess, P.A., by Bruce W. Vanderbloemen, for defendant, appellee.

HEDRICK, Judge.

[1] Plaintiff contends, based on Assignment of Error No. 3, that the trial judge erred in submitting the issue of contributory negligence. Plaintiff argues there is no evidence in the record to support the jury's finding of contributory negligence. Defendant,

Watson v. Storie

on the other hand, argues that "there was more than ample opportunity for the decedent to remove himself from the vehicle . . . or to remonstrate the driver to cease driving recklessly, let someone else drive, or stop driving fast and weaving around cars. Instead, the decedent chose to remain in the truck, continue drinking, say nothing of the operation of the vehicle, and not take advantage of the opportunity to remove himself from the danger as it was then presented."

The principle is generally recognized that when a gratuitous passenger becomes aware that the automobile in which he is riding is being persistently driven at an excessive and dangerous speed, the duty devolves upon him in the exercise of due care for his own safety to caution the driver, and, if his warning is disregarded and speed unaltered, to request that the automobile be stopped and he be permitted to leave the car. . . . But this duty is not absolute and is dependent on circumstances. [Citations omitted.] *Where conflicting inferences may be drawn from the circumstances*, whether the failure of the passenger to avail himself of opportunity for affirmative action for his own safety should constitute contributory negligence is a matter for the jury.

Samuels v. Bowers, 232 N.C. 149, 153, 59 S.E. 2d 787, 790 (1950) (emphasis added). The issue of contributory negligence should not be submitted to the jury, however, if the evidence reveals that plaintiff was not on notice as to defendant's negligent behavior or, having notice, had insufficient time or opportunity to react. *Norfleet v. Hall*, 204 N.C. 573, 169 S.E. 143 (1933); *Gwaltney v. Keaton*, 29 N.C. App. 91, 223 S.E. 2d 506 (1976).

In the instant case, three witnesses offered evidence directly relevant to the accident in question. Defendant testified that the road on which the accident occurred had been freshly scraped, and that he had driven on the scraped portion for "maybe a mile" and was traveling at a maximum speed of 15 miles per hour when he came to a curve, encountered loose gravel, lost control of the truck, and ran into an embankment. A State Trooper who investigated the accident testified that the road on which the accident occurred was narrow and "curvey," with no shoulder and a "pretty steep" grade. Trooper Hollifield stated that there was

Watson v. Storie

gravel "all over the road." The witness added that, at the time of his investigation, defendant told him he was traveling at approximately twenty-five miles per hour when the accident occurred. Defendant's brother, the third witness with knowledge of the accident, testified that defendant was not driving "too fast" or in a reckless fashion. We think it clear that this evidence does not permit "conflicting inferences" as to plaintiff's intestate's contributory negligence. The record is devoid of evidence tending to show that plaintiff was aware, or in the exercise of due care should have been aware, of negligent behavior on the part of defendant, or that plaintiff had opportunity to remonstrate with defendant prior to the accident. Indeed, assuming the evidence established such notice and opportunity, the result would be the same because the record contains no evidence tending to show that plaintiff did not in fact so remonstrate. Defendant had the burden of proof on the issue of plaintiff's intestate's contributory negligence and, having failed to introduce any evidence in support of his contentions in this regard, was not entitled to have the jury consider the question.

[2] Defendant points to two pieces of evidence which, he contends, support submission of the issue of decedent's contributory negligence to the jury. First, defendant argues that the evidence shows that defendant had been drinking beer prior to the accident, and that Mr. Watson was aware of this. We do not find defendant's contention persuasive. The evidence showed that defendant had consumed three to five beers in a seven-to-eight-hour period, drinking the last one some two hours prior to the accident. There is no evidence that defendant's ability to operate the truck at the time of the accident was in any way impaired by the beer that he consumed two hours earlier. Defendant also puts much emphasis on testimony by the decedent's daughter that defendant was driving "too fast and weaving" some seven hours prior to the accident. We hold this evidence too remote as a matter of law, *Corum v. Comer*, 256 N.C. 252, 123 S.E. 2d 473 (1962), and insufficient to raise an inference of decedent's contributory negligence.

[3] Plaintiff also contends that the court erred in denying plaintiff's motion for a directed verdict on the issue of defendant's negligence, arguing that defendant was barred from relitigating the issue of his negligence by the doctrine of *res judicata*, since

State v. McNair

the issue of defendant's negligence was answered at the first trial in favor of plaintiff. We do not agree. When this Court remanded the case for a new trial because of an error in the instructions with respect to contributory negligence, it is clear the court did not err in retrying the issue of defendant's negligence. The issues of negligence, contributory negligence, and damage were so "inextricably interwoven" that a new trial on all issues was required. See *Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974). Likewise, upon remand for a new trial because there is no evidence in this record to warrant submitting the issue of contributory negligence, there must be a new trial on the issues of defendant's negligence, if any, and plaintiff's damages.

New trial.

Chief Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. HOSEA LEVERN McNAIR

No. 8316SC1190

(Filed 4 September 1984)

1. Criminal Law § 66.11— pretrial showup—no likelihood of misidentification

The use of an unnecessarily suggestive pretrial showup when police brought defendant to a burglary and assault victim's home did not create a substantial likelihood of misidentification so as to require exclusion of the victim's in-court identification of defendant where the victim had ample opportunity to view her assailant at the time of the crimes; she accurately described defendant's height, race, clothing, weight and age; and only a few hours elapsed between the crimes and the pretrial identification.

2. Criminal Law § 86.5— impeachment of defendant—prior criminal acts—good faith basis

The State had a good faith basis for asking defendant on cross-examination whether he was involved in opening coin-operated machines and selling cookies and candies taken from them where the State had obtained information from people living in the community that they had seen defendant in possession of a large number of packages taken from coin-operated machines and that defendant was attempting to sell the packages.

State v. McNair

APPEAL by defendant from *Lewis (John B.)*, Judge. Judgments entered 16 June 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 22 August 1984.

Defendant was charged in proper bills of indictment with second degree burglary and assault inflicting serious injury. He was found guilty of second degree burglary and assault on a female. From judgments imposing a twenty-five-year prison term for burglary and a two-year term for assault on a female, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Gary Lynn Locklear for defendant, appellant.

HEDRICK, Judge.

[1] Defendant brings forward and argues two assignments of error. First he contends that the court erred in admitting into evidence the in-court identification of the defendant, arguing that the identification was "tainted" by an impermissibly suggestive out-of-court identification.

The record shows that Mrs. Alford, the prosecuting witness, provided police with a description of her assailant, and that within a few hours the police returned to Mrs. Alford's home with the defendant. Mrs. Alford then identified defendant, who was standing on her porch, as the man who had attacked her. Mrs. Alford again identified defendant as her attacker at trial. Following *voir dire* on the matter, the trial judge upheld the admission of both identifications over defendant's allegations that impermissibly suggestive procedures had been utilized.

Defendant correctly contends that the United States Supreme Court has held that pretrial identification procedures which are "unnecessarily suggestive and conducive to irreparable mistaken identification" amount to denial of due process of law. *Stovall v. Denno*, 388 U.S. 293, 302, 18 L.Ed. 2d 1199, 1206, 87 S.Ct. 1967, 1972 (1967). Our courts have recognized that "show ups" are inherently suggestive, *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128, 59 L.Ed. 2d 90, 99 S.Ct. 1046 (1979), and the State does not contend that use of

State v. McNair

this suggestive procedure was made necessary by any circumstances peculiar to the instant case. Use of unnecessarily suggestive identification procedures does not require exclusion of identification testimony, however, unless those procedures created a "substantial likelihood of misidentification." *Neil v. Biggers*, 409 U.S. 188, 201, 34 L.Ed. 2d 401, 412, 93 S.Ct. 375, 383 (1972). In determining whether an identification possesses sufficient reliability to support a conclusion that no such likelihood of mistake exists, the following factors are to be considered:

. . . the opportunity of the witness to view the accused at the time of the crime, the witness' degree of attention at the time, the accuracy of his prior description of the accused, the witness' level of certainty in identifying the accused at the time of the confrontation, and the time between the crime and the confrontation.

State v. Thompson, 303 N.C. 169, 172, 277 S.E. 2d 431, 434 (1981) (citing *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972)).

In the instant case the court found the following facts:

That on the 20th of January, 1983, the prosecuting witness entered her home, turned on the light and was immediately confronted by a person from whom she was but a few inches for a period of time, during which the person spoke to her; that she saw him thereafter on movement in the house into different rooms and back, during which several minutes elapsed, in a lighted space, and on several occasions the defendant was a matter of inches from the face of the person in the house; that she observed his height, weight and clothing, and described his race and age of the person; that, thereafter, the person was brought back to her home within a matter of hours, whom she described to be at that time the person who had first confronted her in her home.

These findings of fact are supported by substantial evidence in the record and are thus conclusive on appeal. *State v. Hammond*, 307 N.C. 662, 300 S.E. 2d 361 (1983). We hold that these findings in turn support the court's conclusion of law that evidence regarding Mrs. Alford's identification of defendant was proper and admissible. The witness had ample opportunity to

State v. McNair

view her assailant at the time of the crime. She accurately described defendant's height, race, clothing, weight, and age. Finally, only a few hours elapsed between the crime and the identification. We believe these facts support the conclusion that there was no "substantial likelihood of misidentification" under the circumstances. The assignment of error is overruled.

[2] Defendant next contends that the court erred in permitting the State to cross-examine defendant for impeachment purposes about prior criminal acts. Defendant objects to the following question put by the State:

Q. The two of you—three of you all weren't involved in opening of coin-operated machines and taking cookies and candies out of them and selling them?

On objection by defendant, the trial court conducted an inquiry out of the presence of the jury on the issue of the State's good faith basis for the question. The State claimed the information had been obtained from "people who live in the community" in the course of investigating the offenses charged in the instant case, that these people had observed defendant in possession of a large number of packages obtained from coin-operated machines, and that defendant was attempting to sell the packages. We think the court correctly held this information sufficient good faith basis for inquiring about defendant's prior acts and hold in any event that the question was not prejudicial to defendant, since the record shows that defendant denied the acts referred to in the challenged question. *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973).

No error.

Chief Judge VAUGHN and Judge WELLS concur.

State v. Snyder

STATE OF NORTH CAROLINA v. LANCE ALBERT SNYDER

No. 8321SC674

(Filed 4 September 1984)

Criminal Law § 5.2; Homicide § 7.1—intoxicated defendant—evidence of unconsciousness

The trial court erred in excluding expert testimony that the highly intoxicated defendant may have sustained a concussion which would have rendered him unconscious even without the presence of alcohol, in refusing to allow defense counsel to raise the defense of unconsciousness in his closing jury argument, and in refusing to instruct on the defense of unconsciousness.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 3 December 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 January 1984.

Defendant was tried on indictments charging him with three counts of second degree murder. On 4 September 1982, defendant and his brother went to Smokey's Lounge in Forsyth County after having had several mixed drinks during the course of the afternoon. Worth Shelton, the owner of Smokey's Lounge, refused to serve them and told them to leave. As they were leaving an altercation ensued during which Shelton struck defendant on the chin with his fist. He then hit defendant above the eye, causing him to fall into the door. As he was falling, defendant's head hit the base of the door.

Defendant then walked to his car and drove out of the parking lot and onto Highway 311 at excessive speed. While leaving the parking lot he struck the rear of a motorcycle on which two people were riding, forcing it off the road. Defendant then increased his speed, drove through a red light and entered an intersection where he struck a car, killing three passengers. After the accident defendant was taken to Forsyth Memorial Hospital. Records of the hospital emergency room indicated that defendant had a .32 alcohol blood content when admitted.

Defendant testified at trial that he had no memory of any events that occurred after he was hit and knocked into the door at Smokey's Lounge. Defendant's attempt to offer medical testimony showing that he was unconscious at the time of the accident was denied by the court, as was his attempt to argue the defense

State v. Snyder

of unconsciousness to the jury. Moreover, the court refused to instruct the jury on the issue of unconsciousness. The jury was allowed to return one of four verdicts: guilty of second degree murder, guilty of involuntary manslaughter, guilty of death by vehicle, or not guilty. It found defendant guilty of second degree murder in all three cases.

After finding as an aggravating factor that defendant was engaged in a pattern of violent conduct, and finding no mitigating factors, the court sentenced defendant to 20 years on each of the three counts to be served concurrently, such sentence being in excess of the presumptive term of 15 years. On appeal to the Court of Appeals, the Court held that the conviction constituted "plain error" since there was no evidence at trial of malice on the part of defendant. 66 N.C. App. 358, 311 S.E. 2d 379 (1984). On discretionary review, the Supreme Court reversed the decision of the Court of Appeals and remanded the case to this Court for further consideration.

Attorney General Rufus L. Edmisten, by Associate Attorney David E. Broome, Jr., for the State.

James J. Booker and W. Eugene Metcalf for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred in refusing to allow testimony regarding his alleged unconscious condition at the time of the accident, in refusing to allow defense counsel to raise the defense of unconsciousness in his closing argument to the jury, and in refusing to instruct the jury as to the defense. We agree and order a new trial.

Unconsciousness is recognized in this State as a complete defense to a criminal charge. *State v. Caddell*, 287 N.C. 266, 290, 215 S.E. 2d 348, 363 (1975). In the case at bar, defendant attempted to introduce the testimony of Dr. Lawrence McHenry, a neurologist, and Dr. Selwyn Rose, a psychiatrist, both of whom had examined the defendant. On voir dire examination the two doctors testified that there was evidence to suggest that defendant may have sustained a concussion as a result of the fall in Smokey's Lounge. Although Dr. McHenry would not state that the blow by itself

State v. Snyder

would have rendered defendant unconscious, Dr. Rose did in fact testify that, even without the presence of the alcohol, the blow could have caused defendant to become unconscious. On each occasion, the trial court excluded the testimony.

Judge Rousseau stated at trial that he based his decision to exclude the testimony of the two doctors on the fact that voluntary intoxication is not a defense to second degree murder, apparently agreeing with the State that but for defendant's intoxicated condition, the offense would not have occurred. We find that the court erred in excluding the testimony of Dr. Rose.

To be admissible as substantive evidence, testimony must be relevant and must not be forbidden by some specific rule of law. *Freeman v. Ponder*, 234 N.C. 294, 304, 67 S.E. 2d 292, 300 (1951). Although we agree that voluntary intoxication is no defense to a criminal charge, we do not find a specific rule of law which would bar testimony that defendant may have sustained a concussion which would have rendered him unconscious even in spite of his intoxication. Therefore, there is no specific rule of evidence which would bar the testimony of Dr. Rose.

On finding that the testimony of Dr. Rose was improperly excluded, it necessarily follows that the court erred in refusing to permit defense counsel to argue the unconsciousness defense to the jury and in refusing to give the jury relevant instructions on unconsciousness.

The question of whether a highly intoxicated defendant can raise the defense of unconsciousness is one which has not been clearly decided in this State. We are aware of *State v. Williams*, 296 N.C. 693, 252 S.E. 2d 739 (1979), in which Justice Britt stated that "[i]n view of the overwhelming evidence that defendant's mental state at the time of the commission of the offense in question was brought about by his excessive consumption of intoxicants," there was no error in refusing to instruct the jury on the defense of unconsciousness. *Id.* at 701, 252 S.E. 2d at 744.

We also are aware, however, of the case of *State v. Smith*, 59 N.C. App. 227, 296 S.E. 2d 315 (1982), in which this Court held that where competent evidence in support of an unconsciousness defense is introduced at trial, the Court must instruct the jury as to that defense. In *Smith*, the Court reasoned that, under G.S.

State v. Vick

15A-1232 (1978), the trial court is required to instruct on all substantial features of the case and that evidence of a complete defense is a substantial feature. *Id.* at 228-29, 296 S.E. 2d at 316, citing *State v. Jones*, 300 N.C. 363, 266 S.E. 2d 586 (1980). Significantly, the Court added: "Cognizant of the high potential for abuse inherent in defenses of this sort, we express no opinion as to the weight or credibility properly accorded this evidence; that determination is for the jury." *Id.* at 230, 296 S.E. 2d at 317.

In the case at bar, the defense of unconsciousness was not established by the evidence, but the trial court excluded testimony that may have put the defense in issue. Following the reasoning of this Court in *State v. Smith*, *supra*, we hold that the trial court committed error in refusing to permit defense counsel to pursue the unconsciousness defense before the jury.

New trial.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. JEFFREY VICK

No. 839SC1119

(Filed 4 September 1984)

1. Burglary and Unlawful Breakings § 3— breaking or entering— indictment— felony intended

An indictment was insufficient to charge felonious breaking or entering where it alleged that defendant intended to commit "a felony" but failed to specify the felony which defendant intended to commit, and defendant could only be convicted of misdemeanor breaking or entering under such indictment.

2. Criminal Law § 80.1— employee time card—admissibility

A sufficient foundation was laid for the admission of an employee time card where the evidence showed that the time card was a record made in the regular course of business and that such records are relied upon by the employer in preparing the business payroll.

APPEAL by defendant from *Smith (Donald L.)*, Judge. Judgment entered 16 March 1983 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 27 August 1984.

State v. Vick

Defendant was charged with and convicted of felonious breaking or entering in violation of N.C. Gen. Stat. Sec. 14-54. From a judgment on the verdict imposing a prison sentence of eight years, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant, appellant.

HEDRICK, Judge.

[1] In his first assignment of error defendant contends his "conviction for felonious breaking or entering must be reversed because the indictment which failed to allege the intended felony was void." The record reveals that defendant was charged in an indictment containing the following language:

Date of Offense: 1-27-83

Offense in Violation of G.S.: 14-54

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did break and enter a residence occupied by Marjorie Sue Denton, with the intent to commit a felony therein.

Defendant contends that this indictment fails to set out an essential element of the offense of felonious breaking or entering, *to wit*, intent to commit a specific identified felony, and "cannot therefore support the felony judgment entered."

The offense of felonious breaking or entering, set out in N.C. Gen. Stat. Sec. 14-54(a), has as one essential element felonious intent. *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965). Defendant cites several cases in support of his contention that an indictment charging felonious breaking or entering is defective if it fails to specify the felony which defendant intended to commit upon breaking or entering the residence. *See, e.g., State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979); *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923). The State correctly points out that the cases cited by defendant involve the offense of burglary, set out in G.S.

State v. Vick

14-51, rather than breaking or entering under G.S. 14-54. We perceive no principled distinction between the two offenses, however—nor does the State argue that such a distinction exists—which would logically dictate that indictments charging burglary specify the felony intended by a defendant while indictments charging breaking or entering allege only that “a felony” was intended. We also note that the similarity of the two offenses was recently recognized by our Supreme Court in *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983). We thus hold that an indictment charging the offense of felonious breaking or entering is sufficient only if it alleges the particular felony which is intended to be committed. Defendant’s conviction of felonious breaking or entering is thus reversed and remanded to the trial court for judgment on a verdict of guilty of misdemeanor breaking or entering. See *State v. Cooper*, 288 N.C. 496, 219 S.E. 2d 45 (1975).

Defendant next assigns error to the admission of testimony tending to rebut the alibi defense relied on by defendant. In support of his contention that he spent the day at his mother’s home on 27 January 1983, the day of the offense, defendant offered the testimony of his mother, Aline Vick, who testified that she was at home with her son on that day. On rebuttal, the State offered testimony by Jo Bachelor, custodian of employee time records at Ms. Vick’s place of employment, regarding “time cards” indicating when an employee checked in and out on a particular day. This assignment of error is based on exceptions to the trial judge’s rulings on direct examination of the witness regarding Ms. Vick’s time card for the date in question. We have carefully examined each exception upon which this assignment of error is based and find that the judge did not err in admitting the testimony challenged by such exceptions.

[2] Defendant next contends that the court erred in admitting into evidence Ms. Vick’s time card, arguing that the State failed to make an adequate preliminary showing that the time clock which made entries on the card “was accurate and operating properly.” The record reveals that the time card introduced into evidence was a record made in the regular course of business and that such records are relied upon by Ms. Vick’s employer in preparing the business payroll. We think the evidence in question bears sufficient indicia of reliability as to have been properly admitted by the trial court. See *Builders Supply v. Dixon*, 246 N.C.

State v. Triplett

136, 97 S.E. 2d 767 (1957) (machine-made ledger entries made in regular course of business held properly admitted into evidence). We note that defendant, while given ample opportunity to challenge the accuracy of the time clock on cross-examination, did not do so. The assignment of error is without merit.

Reversed and remanded for entry of judgment in accordance with this opinion.

Chief Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. DOCKIE LEONARD TRIPLETT

No. 8323SC1050

(Filed 4 September 1984)

1. Homicide § 2— solicitation to commit murder—felony

Solicitation to commit murder is a felony for which the superior court has jurisdiction. G.S. 7A-271; G.S. 14-3(b).

2. Criminal Law § 145.6— forfeitures—inapplicable to money paid to undercover agent

The statute relating to forfeiture of gain acquired through felonies, G.S. 14-2.3, did not apply to money paid by defendant to an undercover agent on a contract to kill defendant's wife. However, the trial judge properly disposed of the money since defendant voluntarily relinquished any interest he had in the money when he gave it to the undercover agent.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 19 July 1983 in Superior Court, ASHE County. Heard in the Court of Appeals 20 August 1984.

Defendant was charged in a bill of indictment with soliciting James R. Lester to kill and murder Patsy Triplett, wife of the defendant.

The evidence for the State reveals that prior to his arrest, the defendant made a \$2,500 cash advance payment to Lester, a Special Agent for the State Bureau of Investigation, posing as a professional killer. In return, Lester was to have killed Mrs. Triplett and received an additional \$2,500 upon completion of the task.

State v. Triplett

The defendant pleaded guilty to the charge and judgment was entered imposing a sentence of three years. The court did not fine the defendant but subsequently, on motion of the State, declared the \$2,500 advance payment forfeited.

Attorney General Edmisten, by Roy A. Giles, Jr., Assistant Attorney General, for the State.

Vannoy & Reeves, by Wade E. Vannoy, Jr., for the defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant sets forth two grounds for appeal. He initially maintains that it was error for the trial court to deny his motion to dismiss based upon the ground that the offense charged was a two-year misdemeanor and, therefore, was not within the jurisdiction of the Superior Court. We disagree.

This Court clearly established in the case of *State v. Keen*, 25 N.C. App. 567, 214 S.E. 2d 242 (1975) that solicitation of murder is an infamous offense. G.S. 14-3(b) provides that "[i]f a misdemeanor offense . . . be infamous [or] done in secrecy and malice . . . the offender shall . . . be guilty of a Class H felony." G.S. 7A-271, in turn, provides that the trial of all felony actions shall be within the exclusive and original jurisdiction of the Superior Court.

[2] Defendant additionally contends that it was error for the trial court to order the forfeiture of the \$2,500 cash payment made to Special Agent Lester. Both the State and defendant contend that the issue is the interpretation of G.S. 14-2.3 ("Forfeiture of gain acquired through felonies") which provides that ". . . in the case of any violation of a general statute constituting a felony . . . any money or other property or interest in property acquired thereby shall be forfeited to the State of North Carolina, including any profits, gain, remuneration, or compensation directly or indirectly collected by or accruing to any felon." Subsection (b) of G.S. 14-2.3 provides that an action to recover such property shall be brought by either a District Attorney or the Attorney General pursuant to G.S. 1-532. This statute describes a category of contraband which is not *per se* illegal to possess at all times but only derivatively subject to seizure due to its connection with

State v. Triplett

illegal acts. For a comparison of contraband *per se* and derivative contraband, see *Director of Finance, Prince George's Co. v. Cole*, 296 Md. 607, 619, 465 A. 2d 450 (1983). For example, various sections of the North Carolina General Statutes define such contraband to include vehicles used to transport illegal drugs (G.S. 90-112), vehicles used in prearranged racing (G.S. 20-141.3(g)) and deadly weapons used in crimes (G.S. 14-269.1).

Unlike these sections, however, G.S. 14-2.3 authorizes the forfeiture of property characterized not by its use in a particular crime but as the acquired result of a crime. We agree with defendant that the statute does not apply in this case.

Here, however, we do not have a forfeiture in the usual sense. One cannot forfeit that which he does not have. Defendant voluntarily relinquished any interest he had in the \$2,500 when he gave it to the undercover agent as part payment on the contract to kill defendant's wife. We hold that the judge made an appropriate disposition of the funds.

Affirmed.

Judges HEDRICK and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 SEPTEMBER 1984

CURTIS v. DEPT. TRANSPORTATION No. 8325SC875	Caldwell (83CVS165)	Reversed & Remanded
DAVIS v. POWELL No. 834DC1139	Onslow (83CVD721)	Affirmed
FESPERMAN v. FESPERMAN No. 8320DC1100	Stanly (81CVD674)	Vacated in part; Affirmed in part
HODGES v. KELLY No. 8317DC1026	Caswell (80CVD60)	No Error
IRELAND v. IRELAND No. 833DC794	Pamlico (82CVD79)	Affirmed
MORRISON v. MORRISON No. 8327DC1011	Gaston (83CVD1006)	Vacated & Remanded
MOSLEY v. DEEP RIVER WASHING No. 8318SC1079	Guilford (81CVS3488)	Affirmed in part; Reversed in part
MURPHY v. HICKORY SPRINGS MFG No. 8310IC1095	Industrial Commission (I-1366)	Affirmed
STATE v. BORDEAUX No. 835SC1263	New Hanover (83CRS6461) (83CRS6465)	No Error
STATE v. CARVER No. 8327SC1163	Gaston (82CRS28917) (82CRS28918)	Reversed
STATE v. LEE No. 8326SC1182	Mecklenburg (83CRS2195)	No Error in trial; Remanded for resentencing
STATE v. WILLIAMS No. 838SC1226	Wayne (83CRS548)	No Error
TALIAFERRO v. WRIGHT No. 8315DC1115	Orange (78CVM58)	No Error

In re Webb

IN RE: RONNIE ODOM WEBB, III

No. 8326DC565

(Filed 18 September 1984)

Parent and Child § 1— termination of parental rights—sufficiency of evidence of neglect

Evidence was sufficient to support the trial court's conclusion that a child was neglected and it was within the discretion of the court as to whether to terminate parental rights where there was evidence that respondents did not understand the importance of proper food for their child and, as a result, he suffered from malnutrition requiring hospitalization on one occasion; respondents did not make an adequate effort to see that their child received prescribed medication; and respondents allowed the child to live in a filthy home. G.S. 7A-289.32. G.S. 7A-517(21).

Judge BECTON dissenting.

APPEAL by respondents from *Bennett, Judge*. Judgment entered 31 January 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 4 April 1984.

The respondents Ronnie O. Webb, Jr. and Mona F. Webb appeal from a judgment terminating their parental rights to Ronnie Odom Webb, III. The Mecklenburg County Department of Social Services petitioned on 22 September 1982 for the termination of these rights on the ground that the respondents had neglected the child as defined in G.S. 7A-517(21) and that for a continuous period of more than six months next preceding the filing of the petition failed to pay a reasonable portion of the cost of care for the child who had been in foster care since November of 1981.

The evidence at the hearing showed the respondents were married on 18 December 1978 at which time Mona F. Webb was fourteen years of age. A daughter has been born to the marriage who is not subject to this proceeding. Ronnie Odom Webb, III was born to the respondents on 5 July 1980. On 5 March 1981 the child was taken by a social worker for the Mecklenburg County Department of Social Services to Charlotte Memorial Hospital where he was admitted and treated for malnutrition. The caseworker testified that Mona Webb did not seem to understand the gravity of the child's condition. The caseworker testified that Mona Webb referred to "Ronnie as 'just a skinny baby,' when in

In re Webb

fact, he had an enlarged head, bloated stomach, skinny, bony extremities" The Department of Social Services obtained a nonsecure custody order on that date. The child stayed in the hospital for eleven days. On 24 March 1981, the child was held to be neglected as defined by G.S. 7A-517(21). He was placed in a foster home and remained there until 31 July 1981 at which time the court ordered, against the recommendation of the Department, that the child be returned to the respondents for a trial placement.

After the child was returned to the home of the respondents, they enrolled in various courses to help them become better parents. Announced and unannounced visits were made by a caseworker. The respondents were furnished with food stamps because of inadequate food within their home. In October 1981 Ronnie was sick and the respondents told the caseworker the prescription for his medication had been lost. Agents of the Department of Social Services purchased the medication and delivered it to the respondents. On 30 October 1981, a caseworker went to the home and found a strong smell of urine. Ronnie was wet, dirty, and coughing. There was inadequate food in the house. On 13 November 1981 the child was voluntarily returned to foster care. The child visited the parents on occasion until the petition was filed in this case. After the child was returned to foster care, the Department requested \$40.00 per month for child support from the respondents but it was determined it would be better to keep this money in the home, and the Department withdrew the request. No contribution was made until the petition was filed. The respondents contributed \$125.00 for child support between the filing of the petition and the hearing.

The court found facts based on the evidence and concluded that sufficient grounds existed to terminate the parental rights of the respondents under the provisions of G.S. 7A-289.32(2) and (4). It terminated the parental rights and obligations of the respondents. The respondents appealed.

Ruff, Bond, Cobb, Wade and McNair, by Robert S. Adden, Jr. and William H. McNair, with Guardian ad litem Ellis M. Bragg joining on the brief; for petitioner appellee Mecklenburg County Department of Social Services.

In re Webb

Jordan, Durham and Wilson, by Samuel A. Wilson, III, for respondent appellant Ronnie Odom Webb, Jr.

Sheely and Blum, by James Gronquist and Shelley Blum, for respondent appellant Mona F. Webb.

WEBB, Judge.

G.S. 7A-289.32 provides that a court may terminate parental rights on seven different grounds. The court in this case concluded that two of the grounds for termination existed. These were under subsections (2) and (4) which provide in part:

"(2) The parent has . . . neglected the child. The child shall be deemed . . . neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-517(21).

. . . .

(4) The child has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child."

G.S. 7A-517(21) provides in part:

"Neglected Juvenile.—A juvenile who does not receive proper care, supervision, or discipline from his parent . . . or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare"

There was evidence that the respondents did not understand the importance of proper food for the infant and as a result, he suffered from malnutrition requiring hospitalization on one occasion. There was also evidence the respondents did not make an adequate effort to see the infant received prescribed medication. There was also evidence the respondents allowed the child to live in a filthy home. The court made findings of fact based on this evidence and concluded the child was neglected as defined in G.S. 7A-517(21). We affirm this conclusion of the court. Having concluded the child was neglected, it was within the discretion of the

In re Webb

court as to whether to terminate the parental rights. We hold the court did not abuse its discretion by so doing.

If the court properly concluded that parental rights should be terminated on any of the seven grounds enumerated under G.S. 7A-289.32, we cannot disturb its judgment. See *In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981). We have affirmed the termination pursuant to subsection (2). We do not pass on the termination pursuant to subsection (4).

The respondent Mona F. Webb contends the court did not adequately consider her efforts to improve herself as a mother after she voluntarily relinquished custody of the child. She also argues that there was evidence that she and her husband had separated and evidence that they were making an effort to reunite which should provide the infant with a good home. Ronnie O. Webb, Jr. argues that the evidence shows his economic condition had improved and this was not taken into account. These were considerations for the district court in exercising its discretion as to termination. When the district court concluded the child was neglected, it was within the court's discretion taking into account the best interests of the child as to whether parental rights should be terminated. See *In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984).

The respondents argue that the petitioner has not met its burden of proof which requires that proof of all facts be by "clear, cogent, and convincing evidence." We believe the facts on which the court based its conclusion were virtually not in dispute. Once the court had made this conclusion it was within its discretion as to whether the parental rights should be terminated. The exercise of this discretion is not subject to the burden of proof.

Affirmed.

Judge EAGLES concurs.

Judge BECTON dissents.

In re Webb

Judge BECTON dissenting.

Nothing in the record justifies the irretrievable destruction of the Webb family as set forth in the decretal part of the judgment which follows:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that all rights and obligations of Mona Rene Webb and Ronnie Odom Webb, Jr., with respect to Ronnie Odom Webb, III, and all rights and obligations of said child with respect to his mother and his father, arising from any biological or legal parental relationship between them be and they are hereby, terminated.

I therefore dissent in both cases, although the case for the father is not nearly as strong as the case for the mother.

In upholding the trial court's decision to terminate parental rights, the majority has, in my view:

1. Erroneously applied the same standard of neglect justifying nonsecure custody orders or temporary removal to termination proceedings by placing undue weight on the initial determination of neglect prior to temporary removal;

2. Unfairly deprived the mother of her rights despite her earnest and successful efforts to meet the requirements imposed by the Mecklenburg County Department of Social Services (DSS);

3. Iniquitously, and in Solomon-like fashion, given the mother the Hobson's choice of keeping her child by severing her relationship with her husband, the child's father;

4. Effectively condoned a "two wrongs make a right" policy, which considers the bonding between child and foster parent resulting from the last placement as most significant, even when a mistake had been made in the initial placement; and

5. Mistakenly analyzed this case as an "exercise of discretion" case when, because the findings are not based on clear, cogent, and convincing evidence, the exercise of discretion question is not presented. Instead, this is an "error of law" case.

I also believe the parents win on the issue not reached by the majority—whether, as a matter of law, the parents, for a con-

In re Webb

tinuous period of six months next preceding the filing of the petition, failed to pay a reasonable portion of the cost of care for the child under N.C. Gen. Stat. § 7A-289.32(4) (1981).

I

POLICY CONSIDERATIONS

A. The family occupies a special and highly revered place in the life of our nation and people. Thus our courts have accorded full constitutional protection to family relationships. "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-4, 52 L.Ed. 2d 531, 540, 97 S.Ct. 1932, 1938 (1977) (footnotes omitted).

Accordingly, the decision to terminate parental rights may only be made in circumstances in which the parents have been afforded the full protection of process due under our constitutions:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54, 71 L.Ed. 2d 599, 606, 102 S.Ct. 1388, 1394 (1982).

B. In *Santosky* the Court recognized that in most parental rights cases there is an immense disparity in litigation resources and options between the State and the parents:

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predeter-

In re Webb

mined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated State termination efforts.

455 U.S. at 763-64, 71 L.Ed. 2d at 613, 102 S.Ct. at 1399-1400 (footnote omitted). These factors continue to apply even when, as in North Carolina, the State ensures formal procedural rights such as appointed counsel, notice, right to cross examine, and periodic review. The *Santosky* Court therefore held that parental rights could only be terminated upon the State presenting "clear and convincing" evidence to support its case. North Carolina had already conformed to this standard, requiring, "clear, cogent, and convincing" evidence. N.C. Gen. Stat. § 7A-289.30(e) (1981).

C. What this evidentiary standard *means* remains problematic, however. Our Supreme Court, while conceding that a "clear, cogent, and convincing" standard demands a "stricter degree" of evidence, held that the terms themselves "are not susceptible of separate, analytical comparison with the greater weight of the evidence." *McCorkle v. Beatty*, 225 N.C. 178, 181, 33 S.E. 2d 753, 755 (1945). The Court has declined to elaborate further, merely stating that it falls somewhere between "a preponderance of the evidence" and "proof beyond a reasonable doubt." *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977). Brandis suggests that the standard creates "bewilderment" for both

In re Webb

judges and juries. 2 H. Brandis, *North Carolina Evidence* § 213 at 164-65 n. 47 (2d rev. ed. 1982).

The United States Supreme Court has also struggled with the practical effect of the "clear and convincing" standard:

[T]he ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catch words do not always make a great difference in a particular case, adopting a 'standard of proof is more than an empty semantic exercise.' [Citation omitted.] In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' [Citation omitted.]

Addington v. Texas, 441 U.S. 418, 424-25, 60 L.Ed. 2d 323, 330, 99 S.Ct. 1804, 1808-09 (1979).

The solicitude for parental rights apparent in *Santosky* and in our G.S. § 7A-289.30(e) (1981) should be something more than a triumph of semantics. The majority opinion in the present case demonstrates how little more it is.

II

ANALYSIS

A. The majority affirms on the basis that the trial court's finding of neglect is supported by clear, cogent, and convincing evidence. The statutes under which this determination was made, G.S. § 7A-289.32(2) (1981) and G.S. § 7A-517(21) (1981) are set out in the majority opinion. They provide for termination if the parent "has abused or neglected the child," in other words, if some instance or instances of abuse or neglect has or have occurred *in the past* sufficient to warrant termination of parental rights at the time of the hearing.

In re Webb

The proper length of time between the acts of neglect justifying termination and the termination itself has provoked some judicial controversy. Most notably, in *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed sub nom. Moore v. Guilford County Dep't of Social Services*, 459 U.S. 1139, 74 L.Ed. 2d 987, 103 S.Ct. 776 (1983), our Supreme Court held rights properly terminated on evidence of neglect that occurred *six years* prior to the hearing. Thereafter the children were placed in foster care, with a clear pattern of parental inattention in the interim. Justice Carlton, joined on this point by Justices Mitchell and Meyer, dissented, arguing that "neglect" as contemplated by the statute means neglect within a reasonable time before the petition, and that any inattention or other failings during the period while the children were in foster care had nothing to do with the statutory grounds of neglect set out in G.S. § 7A-517(21) (1981).

B. Recently, our Supreme Court softened, or at least explained, part of the relevant holding in *In re Moore*. *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984). The *Ballard* Court stated that "termination of parental rights for neglect may not be based solely on conditions which existed in the distant past, but no longer exist" and held that, although

evidence of neglect by a parent prior to losing custody of the child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights . . . [.]

. . .

the trial court erroneously treated the prior adjudication of neglect standing alone as binding upon it and as determinative on the issue of neglect at the time of the termination proceeding.

In re Ballard, slip opinion at pp. 8, 9, 311 N.C. 708, 319 S.E. 2d 227 (1984).

In my view, the *Ballard* Court, although it does not expressly say so, recognizes that the invasion of the interest of family autonomy—indeed, privacy—is much more significant in termination proceedings than in temporary removal proceedings. Therefore, the demands of due process should require a greater showing of the State as *parens patriae*. In some respects, the

In re Webb

distinction I suggest is not unlike the "probable cause" (temporary removal) and "guilt" (termination) distinction that are so familiar in criminal procedure.

In short, *Ballard* requires new findings of fact based on "changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at p. 8.

C. Marital stress alone is not neglect. The trial court's heavy reliance on the parents' marital stress after the temporary removal (*see* subsection E and Section IV, *infra*) indicates that the trial court's conclusion of "neglect" was based unduly on the initial adjudication of neglect. Even reviewing the evidence cited by the majority as supportive of the conclusion that the child was neglected, one finds that the most significant evidence of neglect—malnutrition requiring hospitalization—occurred before temporary removal. That, on occasions, there was inadequate food in the house, and that on one occasion the parents lost a prescription for medication, constitutes the only post-temporary removal evidence. Moreover, there is no evidence of any neglect after the mother had successfully completed parenting classes provided by DSS. In *Ballard*, the Supreme Court, upon its own review of the record, determined that the trial court treated the prior adjudication of neglect as determinative. Here, the trial court's heavy reliance on pre-temporary removal neglect and its failure adequately to find facts on post-temporary removal neglect based on clear, cogent, and convincing proof constitute error in view of *Ballard*.

D. Even if we were not to consider *Ballard*, *Moore* is distinguishable from the present case. The evidence of the original neglect in *Moore* indicated a pattern of violent and even criminal conduct toward the children on the part of the parents. Such conduct would understandably continue to carry heavy weight with the courts even at some distant time in the future. In contrast, the only thing the original neglect adjudication proves in this case is that the parents were very poor, very young, and very unskilled in parenting, defects which can be cured with time and which, in fact, the mother has made substantial efforts toward curing. For example, consider the first health problem which arose in March 1981. Ronnie, the minor child, was unable to get enough milk from his bottle. After three days of hospitaliza-

In re Webb

tion, it was discovered that he could not suck through a regular nipple because he was premature, and once the nipples were changed, he was able to suck the proper amount of milk. Again, for the above reasons, I find no clear, cogent or convincing evidence of post-temporary removal neglect.

E. The appropriate ground on which the trial court should have decided the case appears to be N.C. Gen. Stat. § 7A-289.32(3) (1981):

The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

The record does contain some evidence that the parents failed to show "substantial progress" in correcting the conditions leading to placement in foster care. The trial judge's comments, in announcing his disposition of the case, clearly reflect that this lack of progress, *as a practical matter*, formed the basis for his order. He noted that two primary problems had existed which made the parents' home unsuitable, (1) poverty and (2) marital stress, and that the money problem was solved at the time of the hearing. He continued:

The second one has not been solved and by the testimony of every witness who has been on the witness stand will not be solved. The evidence shows clearly that Mona Webb has taken probably as—exerted as much effort and has made as much progress as any parent who has come into this court, but it has been almost entirely unilateral. The evidence shows, even from Mr. Webb's own testimony, that he does not recognize to date that a problem exists in the marriage or that it affects the child or that he has any obligation to deal with it. The testimony of [DSS] confirms what I think the other evidence shows; that if the parents are reunited

In re Webb

without him dealing with that situation, that the problems will continue to exist; that they will lead probably right back to where we were before.

The judge's comments clearly show that his primary concern lay within the ambit of G.S. § 7A-289.32(3) (1981), not G.S. § 7A-289.32(2) (1981).

What the record does not show, and what it cannot possibly show, is that the parents willfully left the child in foster care for more than two consecutive years. Therefore, G.S. § 7A-289.32(3) (1981) could not serve as grounds for termination. What is apparently happening in this case, and what the majority apparently condones, is that DSS is using the neglect ground as a "short cut" to circumvent the two year waiting period established by the General Assembly. Since foster care ordinarily commences upon some showing of neglect or one of the other grounds for termination of rights, the two year period in G.S. § 7A-289.32(3) (1981) can probably be effectively shortened in this manner in the great majority of cases. This is true even in cases such as this one, in which, unlike *Moore*, the culpability of the parents is not extreme and the parents make an effort to correct their problems.

It is elementary that "a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect. . . ." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E. 2d 443, 447 (1981); see also *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980); 73 Am. Jur. 2d *Statutes* §§ 249-254 (1974). As Judge Wells suggested in his dissenting opinion in *In re Ballard*, 63 N.C. App. 580, 306 S.E. 2d 150 (1983), and as this case clearly shows, the majority's position seriously undermines the effect of G.S. § 7A-289.32(3) (1981). While the current thought among child psychologists may be that two years is too long to leave a child in foster care, they have yet to convince the General Assembly of that proposition. Until they do, the courts must consider termination cases in light of the two-year period established by statute; they err, as does the majority in this case, by using other grounds to cut short that waiting period.

In re Webb

III

In response to the fifteen-year-old mother's contention that no evidence of neglect, which occurred before she received training in those parenting and marital skills that she lacked, should have been considered at the termination proceedings, DSS argues that "any evidence of her subsequent efforts to correct those conditions which led to the child being neglected is irrelevant to the establishment of neglect as a ground for termination." I disagree. As stated by the mother in her brief:

[S]he took advantage of the services offered her by the various community agencies to improve her skills of parenting, especially in the non-economic sense, and continued to show love and affection for the child. However, she was not then given an opportunity to put those new skills to the test of reality through an opportunity of custody of the child. After doing all she could do to prepare herself for her role as a mother, she had the door slammed in her face.

In my view, the majority has unfairly deprived the mother of her rights despite her earnest and successful efforts to meet the requirements imposed by DSS.

IV

Principally on the basis of testimony of social workers suggesting that a "deadly triangle" existed between the mother, the father, and a three-year-old daughter, Elizabeth, who was considered special and who competed with the mother for the affection of the father, the trial court concluded that there were sufficient grounds to terminate parental rights to two-year-old Ronnie, when it found as a fact that the mother *might* resume her marital relationship with the father.

Unquestionably, the mother's relationship with the father played a major role in DSS's decision to file the termination of parental rights petition. The social workers admitted as much. In like fashion, the marital relationship played a predominant role in the trial court's decision to terminate the mother's parental rights: "testimony of the witnesses causes the court to conclude that the stress problem is unlikely to be solved in the reasonable future . . . [and] if the respondent parents are reunited without respondent father's dealing with the marital problems, then the

In re Webb

marital problems will continue to exist and the situations which led to the neglect of the child will most probably reoccur."

The inference is clear. If this had been a custody action between the two parents, the mother would have been awarded custody of the child; but, since she decided to try to save her marriage as well as retain custody of her child, the trial court terminated her parental rights. This type of intrusion into familial privacy may be considered by some as Orwellian Big Brother-ism. After all, this is 1984, and if courts can terminate parental rights because of some perceived effect on a minor child as a result of arguments and fights between parents, a spouse's psychological dependence on the other spouse, a parent's indolence or vices, or the parents' impoverished state, then Orwell may have been right. Big Brother's normative standards and judgment will be given preclusive significance, and there will be only one way to raise a family.

Simply put, I am unable, in this neglect, non-abuse situation, to support the Solomon-like Hobson's choice given the mother by the trial court. DSS has been unable to cite any case which could possibly support such an excessive governmental intrusion into the structure of the family.

V

In finding of fact no. 8, the trial court stated:

That while the child has been in the legal and physical custody of the Department of Social Services, he has been placed in the licensed foster home of Mr. and Mrs. Schlabach; further, that the child has become increasingly attached to his foster family and refers to Mr. and Mrs. Schlabach as 'daddy' and 'mama' respectively; further, that the child continues daily to bond closer to the foster parents; and further, that Mr. and Mrs. Schlabach desire to adopt the child if the child is cleared for adoption.

The trial court did not state what weight it attached to this finding, but DSS argues in its brief that partially "[i]n view of the fact that the child has become increasingly attached to his foster parents, who have expressed a desire to adopt him [,] . . . it is clear that the trial court was acting well within its discretion in concluding that termination of . . . parental rights is within the

In re Webb

best interest of the child." To the extent the trial court and the majority considered bonding to be a determining factor, I express my dissatisfaction with the weight accorded such factor. "[T]he State even has the power to shape the historical events that form the basis for ['bonding' and, therefore] termination." *Santosky*, 455 U.S. at 763, 71 L.Ed. 2d at 613, 102 S.Ct. at 1400. Given the tender ages of the children involved in most of these cases and the length of time it generally takes from temporary removal to termination (in this case it took 2 years and 9 months), bonding between the child and the foster parents is likely to occur and is, therefore, likely to be unduly weighted when balanced against the interest of parents who simply may have been careless, immature, and not mean at all. When the best interest of the child is weighed on the scales of justice, it is wrong to place the heavy thumb of bonding on the side of the foster parents, especially when the parents have not even been given the opportunity to apply admittedly learned parenting skills. There will undoubtedly be many cases in which temporary removal will subsequently be viewed as unfounded, or, indeed, illegal. See *Palmore v. Sidoti*, --- U.S. ---, 80 L.Ed. 2d 421, 104 S.Ct. 1879 (1984). When that occurs, or if the trial court has, in effect, punished parents for their immaturity or has for other reasons made a mistake in an initial placement, it simply compounds the wrongs to say that bonding is determinative. If two wrongs do not make a right, certainly several wrongs do not. Bonding, in this case, in no way justifies the irretrievable destruction of the Webb family.

VI

As suggested above, this case involves a misapplication of law. The majority's "exercise of discretion" analysis is, therefore, in my view, mistaken. Even if, *arguendo*, the law has not been misapplied, DSS did not prove by clear, cogent, and convincing evidence the existence of one or more of the grounds for termination listed in N.C. Gen. Stat. § 7A-289.32 (1981).

VII

The majority does not reach the trial court's determination that the parents failed to provide any support in the six months next preceding the filing of the petition, the second ground of termination. G.S. § 7A-289.32(4) (1981). The trial court failed to make explicit findings for each parent of inability to pay. See *In re*

O'Briant v. O'Briant

Phifer, 67 N.C. App. 16, 312 S.E. 2d 684 (1984) (findings required). More importantly, it failed to resolve the issue whether DSS had excused payment entirely, an omission of particular importance in light of DSS' admission that it excused payment at least partially to keep income in the home. Therefore, I would hold that this finding is also not supported by clear, cogent, and convincing evidence, and accordingly reverse.

CONCLUSION

In my view, the decision of the trial court should be reversed and an order should be entered returning the child to his parents.

I find the trial judge's words themselves most compelling. In announcing his decision to terminate parental rights, the trial judge said:

I confess that I do that with probably more reluctance in this case than any one I've ever heard.

The evidence shows clearly that Mona Webb has taken probably as—exerted as much effort and has made as much progress as any parent who has come into this court. . . .

SHEILA HUFF O'BRIANT v. HUBERT RONNIE O'BRIANT

No. 8314DC991

(Filed 18 September 1984)

1. Divorce and Alimony § 25.9— child custody—change of circumstances—sufficiency of evidence

Evidence was sufficient to support the trial court's finding that there had been a change in circumstances sufficiently substantial to warrant modification of a child custody order where it tended to show that plaintiff moved with the child from Durham County to Bluefield, Virginia; the move was accompanied by increased difficulty in the exercise of visitation rights by defendant and by repeated frustration of defendant's attempts to talk with his child by phone; plaintiff made many statements to the child which were detrimental to his emotional and psychological welfare; the child was upset on numerous occasions following interactions with his mother; and the child expressed a very strong preference to live with his father. G.S. 50-13.7(a).

O'Briant v. O'Briant

2. Divorce and Alimony § 25.9— child custody—emotional fitness of parent—sufficiency of evidence

The trial court's wording that plaintiff suffered from "very serious psychiatric problems" in concluding that she was not then emotionally fit for custody of her child, though improper, was not prejudicial to plaintiff, since the court's conclusion with regard to fitness, based on plaintiff's conduct and the court's observation of plaintiff over a nine-day period, was supported by the findings of fact which were in turn supported by the evidence.

3. Contempt of Court § 6.2— interference with visitation rights—failure to appear—filing action in another state—sufficiency of evidence of contempt

The trial court did not err in concluding that plaintiff was in willful contempt of prior court orders where the evidence showed that plaintiff repeatedly interfered with defendant's telephone visitation of their child, and plaintiff failed to appear for scheduled hearings; however, the trial court erred in holding plaintiff in contempt on the ground that she willfully attempted to avoid, ignore and circumvent lawful orders of the court by filing an action in Virginia.

Judge WELLS dissenting in part.

APPEAL by plaintiff from *LaBarre, Judge*. Order entered 24 February 1983 in District Court, DURHAM County. Heard in the Court of Appeals 20 August 1984.

This is a civil action instituted by plaintiff mother for custody and support of the minor child born of the marriage between plaintiff and defendant. On 25 November 1980 a consent order was entered whereby plaintiff received custody of the child and defendant was ordered to pay child support. On 12 February 1982 defendant father filed a motion in the cause seeking a change of custody of the child and asking that plaintiff be found to be in contempt of previous orders entered by the court. On 24 February 1983 Judge LaBarre entered an order, which consumes thirty pages in the record, granting custody of the child to defendant, giving plaintiff limited and conditional visitation rights, and sentencing plaintiff to 120 days in jail for four separate contempt violations, such term being stayed on condition that plaintiff fully comply with all provisions of the order. Plaintiff appealed.

Robert A. Hassell for plaintiff, appellant.

Arthur Vann for defendant, appellee.

O'Briant v. O'Briant

HEDRICK, Judge.

The procedural history of this case, though lengthy, is necessary to an understanding of the issues raised by appellant and so is fully outlined below:

On 31 October 1980 Sheila O'Briant filed suit against defendant seeking, among other things, custody of and support for Ronald O'Briant, the only child born of the marriage between plaintiff and defendant. A consent order was entered on 25 November 1980 whereby plaintiff was awarded custody of Ronald, then four years old, and support for the child. The order contained detailed provisions concerning defendant's visitation rights, including a clause stating that defendant might have Ronald visit him on alternate weekends. The consent order further provided that each party had the right to make "a reasonable number of telephone calls" to the child. In July 1981, plaintiff moved from Durham, North Carolina, to Bluefield, Virginia, where she lives with her mother, Virginia Huff. On 15 October 1981 defendant filed a motion in the cause in which he alleged that plaintiff was "curtailing telephone calls" to his son and "refusing visitation on weekends when this defendant has the right to have his son with him. . . ." That same day *ex parte* orders were issued directing plaintiff to honor defendant's visitation rights and to appear before the court and show cause "why the defendant's visitation right should not be clarified and made more certain due to the change of circumstances that have come about since November 25, 1980." On 19 October plaintiff filed a motion in the cause in which she alleged that defendant "grabbed the minor child" on 16 October 1981 approximately six hours before his visitation was scheduled, and that defendant had failed to return Ronald on Sunday evening as required by court order. Plaintiff asked that defendant be held in contempt for his actions and, in a later motion, that she be awarded attorney's fees. Defendant responded, claiming that his actions were prompted by plaintiff's announced intention to defy the court orders relating to defendant's visitation rights. On 22 December 1981 Judge LaBarre entered an order in which he made the following pertinent findings and conclusions:

VII. That the evidence heard herein bares out the fact that there is probable cause to believe that the plaintiff vio-

O'Briant v. O'Briant

lated or intended to violate the prior Orders of this Court by attempting to refuse or alter visitation as previously ordered and refusing to allow the defendant certain phone calls with the minor child as previously ordered herein.

VIII. That the actions of the plaintiff regarding the defendant's visitation with the minor child in attempting to alter or prevent same, was the actual cause of the plaintiff having to engage her attorney to do the work herein. That the plaintiff, therefore, is entitled to no attorney's fees in this case.

IX. That due to the change of residence of the plaintiff and the burden placed on the defendant by this change of residence in exercising visitation with the minor child, the visitation originally set out in the Consent Judgment should be altered and that the plaintiff should share in the expense of the exercise of these visitation privileges by the defendant as hereinafter ordered.

X. That it would be in the best interests of the minor child that the defendant have unlimited and unmonitored phone calls with said child so long as they not interfere with the child's welfare and are not intended to harass the child or the plaintiff.

Judge LaBarre's order held that defendant was not in contempt and modified the provisions of the 25 November 1980 consent order relating to visitation and telephone calls between defendant and Ronald in accordance with the above-quoted findings and conclusions.

On 21 January 1982 plaintiff filed an action in Virginia, seeking modification of visitation. The record contains no indication of the final action, if any, taken by the Virginia court on plaintiff's motion. On 12 February 1982 defendant filed a motion in the cause in which he sought custody of Ronald and asked that plaintiff be held in contempt of the previous orders of the court. Defendant father alleged in this motion that he had made 180 attempts to reach his son by telephone, with success in only four instances. Mr. O'Briant further alleged that plaintiff had stated that she intended to prevent future contact between him and the child. Defendant pointed to plaintiff's interference with his attempts to

O'Briant v. O'Briant

call Ronald and to plaintiff's alleged efforts to "demean and tarnish" him in Ronald's eyes as evidence that a substantial change of circumstances justified modification of the original custody order. On 12 February an order was issued directing Sheila O'Briant to appear at a hearing on defendant's motion on 25 February 1982. The order was served on Ms. O'Briant on 17 February. On 24 February plaintiff's attorney, Joseph Marion, filed a motion to withdraw as counsel, alleging that he was "no longer able to communicate effectively with the Plaintiff." On 3 March Judge LaBarre filed an order which stated that plaintiff failed, without excuse or reason, to attend the 25 February hearing and which continued the matter until 12 March, at which hearing plaintiff was ordered to appear. This order was served on Mr. Marion, plaintiff's counsel of record. On 12 March plaintiff again failed to attend the scheduled court hearing, again offering "no reason or excuse for her absence." The matter was continued once more, and on 28 April Judge LaBarre issued an order directing plaintiff to attend a hearing on 3 May and further directing the parties to "produce and bring before this Court the minor child" for the 3 May hearing. Plaintiff did not attend this hearing, nor did she attend the hearing held the next day, the matter having been continued once again. On 4 May the court conducted a hearing despite plaintiff's absence and awarded temporary custody of Ronald to defendant. At the conclusion of the hearing on 4 May Mr. Marion was allowed to withdraw as counsel for plaintiff. On 14 May an order was entered awarding temporary custody of the child to defendant, permitting plaintiff visitation rights at defendant's residence and in his company, and finding plaintiff to be in contempt of previous orders of the court. No order was entered at this time in regard to the court's finding of contempt. Various motions, not relevant to the questions presently before us, were filed by both parties. On 2 February 1983 the matter came on for hearing on defendant's motion in the cause seeking permanent custody of Ronald and asking that Mrs. O'Briant be held in contempt. Following a hearing that continued for ten days, Judge LaBarre made numerous findings of fact and the following pertinent conclusions of law:

1. [T]here has been a substantial and material change of circumstances since the entry of the Consent Order entered on November 25, 1980 which materially affects the child's

O'Briant v. O'Briant

physical, psychological, and emotional well-being so as to warrant modification by the Court with reference to the custody and visitation. That these changes have occurred prior to and subsequent to the temporary custody Order entered May 4, 1982.

2. That the Defendant is a fit and proper person to have the primary care and custody of the minor child and the best interest of the child dictates that custody be awarded to the Defendant.

3. That the Plaintiff is entitled to limited rights of visitation with her son. Based upon the Plaintiff's conduct which the Court finds to be detrimental to the emotional and psychological welfare of her child, and based further upon reasonable grounds including nine days of in Court observation to conclude that she has some very serious psychiatric problems, and the Court further concludes that visitation should be subject to several conditions.

4. The Plaintiff has willfully, wantonly, and without lawful excuse violated the lawful Orders of this Court and is in contempt of Court as follows:

A. The Plaintiff willfully violated this Court's Order of December 22, 1981, regarding visitations to be allowed to the Defendant.

B. The Plaintiff willfully failed to appear as Ordered at the February 25, 1982 hearing.

C. The Plaintiff willfully failed to appear as Ordered at the hearing set for March 12, 1982.

D. The Plaintiff willfully attempted to avoid and ignore and circumvent the lawful Orders of this Court by violating the provisions of Chapter 50 and 50(a) of the Uniformed [sic] Code by filing an action in the State of Virginia.

Based on extensive findings of fact and the above-quoted conclusions of law, the court entered an order to the following effect: defendant was awarded primary custody of Ronald, subject to plaintiff's visitation rights, which were to be exercised in accordance with detailed conditions set out by the trial court. Under the

O'Briant v. O'Briant

terms of the court order plaintiff was sentenced to thirty days in the Durham County jail for each contempt violation, resulting in a total term of 120 days, with sentence stayed on condition that plaintiff comply with all provisions of the order.

[1] In her first assignment of error plaintiff contends that the court erred in concluding that "there had been a change in circumstances sufficiently substantial to warrant a modification of a previous custody order where neither the evidence nor any finding could support such a conclusion."

N.C. Gen. Stat. Sec. 50-13.7(a) provides that an order relating to custody of a minor child may be modified at any time "upon motion in the cause and a showing of changed circumstances." "'Changed circumstances' as used in the statute . . . means such a change as affects the welfare of the child." *In re Harrell*, 11 N.C. App. 351, 354, 181 S.E. 2d 188, 189 (1971). Such changed circumstances must be substantial, i.e., "[i]t must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified." *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E. 2d 140, 144 (1969). In reviewing the determination of the trial court in custody matters, "[t]he court's findings of fact are conclusive on appeal if there is any competent evidence to support them, even though the evidence might sustain findings to the contrary, and even though some incompetent evidence may also have been admitted." *Pritchard v. Pritchard*, 45 N.C. App. 189, 196, 262 S.E. 2d 836, 840 (1980). Finally, we note that "the trial judge, having the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving the custody of children." *Id.*

Applying these principles to the instant case, we first point out that the court found that plaintiff's conduct is "detrimental to the emotional and psychological welfare of her child." This crucial finding is buttressed by numerous findings relating to specific statements made by plaintiff to Ronald and to specific instances in which plaintiff behaved in a manner detrimental to the child. Merely illustrative of the numerous findings made by the court to this effect are the following:

18. That subsequent to the Plaintiff's move to Virginia in July of 1981, the Defendant began experiencing difficulty

O'Briant v. O'Briant

with telephone communication with his minor son, then age five and a half, in Bluefield. . . . That the Defendant called on a number of occasions and was refused phone conversations by the Plaintiff as "punishment." The Plaintiff stated to the Defendant that she would get an unlisted phone number or change her phone number or even move from Bluefield, Virginia in order to avoid his calls.

. . .

28. During January and February, 1982, the Defendant continued to experience substantial difficulty with phone visitation with his minor son . . . [with] only several successful telephone calls completed out of 180 attempts between November 29, 1981 and February 9, 1982. . . . A number of calls resulted in the phone being taken off the hook or answered and hung up.

. . .

42. Subsequent to the 4th of May, 1982, the Plaintiff, a psychology major, set upon a course of conduct calculated to willfully disrupt the lives of the Defendant and his family, and the minor child, and deviously designed to seriously damage the emotional well-being of her seven year old son as hereinafter set forth.

These events occurred during the Plaintiff's visitation of May 4, 5, 6, 7 and 9, 1982.

That on May 4, 1982 at about 9:15 P.M. the Plaintiff came into the bedroom where the minor child was in bed and told him about the things he was missing in Virginia and that she had gifts and surprises for him and how much his friends and his dog missed him. That the Plaintiff was told by the minor child that he wanted to try living with his father, the Defendant.

. . .

That on the evening of May 6, 1982, the Plaintiff and her mother returned to the home of the Defendant to visit with Ronald who was playing with a puppy that had been given to him by some friends. That the Plaintiff then told the child that his grandmother (Virginia Huff—the Plaintiff's mother)

O'Briant v. O'Briant

had gotten him a kitten, and that when the child asked the grandmother about his kitten she was completely bewildered by this indicating to the Defendant that this "kitten story" was untrue.

A short time later after the Plaintiff had left, she called the minor child asking him what he wanted to do about his dog in Virginia, inferring that since he had a dog here he didn't need one in Virginia.

That on Sunday, May 9, 1982, Mother's Day, the Plaintiff, the mother of this seven year old child, returned to the home of the Defendant and proceeded to hand to her son a small paper bag. That the child, thinking that this was a toy brought by the Plaintiff, opened the bag and found therein a card and a candle that he had bought for his grandmother, Virginia Huff, and the present that he had bought for the Plaintiff. This greatly upset the minor child and he could not understand why his gifts were returned.

That further on that evening the Plaintiff, who had bought the minor child a water pistol, took him in the back yard and sprayed the child with water soaking his shirt and pants notwithstanding the fact that just two days before she had shown such concern about the child having a cold.

43. At the May 10, 1982 visit between the Plaintiff and her child at the home of Mrs. Wilson, there was an episode in which the child asked his mother on a number of occasions "if she loved him, why didn't she ever tell him that she did."

44. On May 13, 1982, the Plaintiff told the child, "I guess they pulled your teeth," meaning the Defendant and his family, and that the Defendant "will beat you."

...

48. On June 3, 1982, there was a conversation between the Plaintiff and the minor child wherein the Plaintiff said that the Defendant "doesn't want me to see you."

...

56. On June 25, 1982, the Plaintiff stated to the minor child, a seven year old little boy, her biological son, that she

O'Briant v. O'Briant

was going to change his room around and let other kids stay in his room since he was not coming home, and the child indicated that he wanted his room left as it was. And she stated that he, the child, shouldn't worry about his toys, if he was down there in Durham. The Plaintiff further stated that there was a little boy down the street who had his dog killed and she asked her minor son, her seven year old son, did he mind if we gave him your dog, that he had seen Pierre, his dog, and couldn't this little boy have your dog, and the child said "No, you can't", and he cries. And she further stated did he mind if she moved his room around and moved his fish around, and the child again pleaded "No." And the Plaintiff stated that she felt sorry for the kids here, that they cried, and she cried, and that she had talked to another Judge and that Judge said that he shouldn't have to live down there in Durham County and that she, the Plaintiff, was not coming down to visit anymore, that she was treated badly by the child's father, and the child cried and she hung up the telephone.

57. On July 2, 1982, there were two conversations, and the first conversation was where she inquired as to where the child was "this morning," and the child said that he didn't remember, and she asked him "whether or not he was losing his mind," and she stated that she was not going to bring his toys down to Durham, and that she was going to give his toys away, and the child pleaded that "that was not fair", and he cried and she hung up in his face.

Our examination of the record reveals ample evidentiary support for the findings of the trial judge regarding plaintiff's treatment of Ronald. Nor can it be seriously questioned that such treatment is detrimental to the child's welfare. In addition to evidence tending to show that Ronald has become visibly upset on numerous occasions following interactions with his mother, the record also contains the following statements by Dr. Renee Schoenfeld, concerning the results of a psychological evaluation of the child: "It is obvious that Ronald is already disturbed and in great conflict regarding the separation and divorce proceedings. The child is worried about his parents being angry with each other. The 'battle' arrangements will certainly only become worse for the child as time goes on."

O'Briant v. O'Briant

The record contains additional evidence tending to support Judge LaBarre's conclusion that a substantial change in circumstances has occurred. First, it is undisputed that plaintiff changed her place of residence some eight months after entry of the consent order. While it is true that a parent's change of residence does not itself amount to a substantial change of circumstances, the effects of such a move on the welfare of the child may well amount to a change of circumstances requiring modification of the original custody order. *Gordon v. Gordon*, 46 N.C. App. 495, 265 S.E. 2d 425 (1980). In the instant case, plaintiff's move to Virginia was accompanied by increased difficulty in the exercise of visitation rights by defendant father and by repeated frustration of defendant's attempts to talk with Ronald on the telephone. The court's findings of fact in this regard are supported by the evidence and lend further support to the crucial conclusion regarding a substantial change of circumstances. Also significant, although not controlling, is the court's finding that Ronald has expressed a "very strong preference" to live with his father. In sum, then, we hold that the challenged conclusion finds abundant support in the court's findings of fact, which are in turn amply supported by the evidence. The assignment of error is without merit.

[2] By her next assignment of error, plaintiff challenges the following conclusion of law made by the trial court:

3. That the Plaintiff is entitled to limited rights of visitation with her son. Based upon the Plaintiff's conduct which the Court finds to be detrimental to the emotional and psychological welfare of her child, and based further upon reasonable grounds including nine days of in Court observation to conclude that she has some very serious psychiatric problems, and the Court further concludes that visitation should be subject to several conditions.

Plaintiff contends that this conclusion is supported neither by the evidence nor by the findings of fact made by the trial judge.

It is well-settled that the trial court, in deciding cases involving the custody of children, may be called upon to evaluate the emotional stability and fitness of the parties. See *Spence v. Durham*, 283 N.C. 671, 198 S.E. 2d 537 (1973). It is equally clear that, in making such an evaluation, the court, sitting as the trier

O'Briant v. O'Briant

of fact, may exercise its "own reason and common sense, and use the knowledge acquired by [its] observation and experience in everyday life." 1 Brandis on North Carolina Evidence Sec. 15 (2d rev. ed. 1982).

In the instant case, we think Judge LaBarre's choice of words, in concluding that plaintiff suffers from "serious psychiatric problems," was unfortunate. Such a conclusion, considered in its technical sense, relates to the underlying causes of plaintiff's behavior and, strictly speaking, may well exceed the limits of the trial court's expertise. We think such hypertechnicality ill-serves the needs of the child, however, and point out that the court's conclusion, considered in context, amounts to a ruling that plaintiff is not presently emotionally fit for custody of Ronald. This conclusion, based on plaintiff's conduct and the court's observation of plaintiff over a nine-day period, is supported by the findings of fact which are in turn supported by the evidence. Furthermore, any error the court may have committed in concluding the plaintiff suffers from "serious psychiatric problems" was in no way prejudicial to plaintiff. The crucial portion of the above-quoted conclusion has been overlooked by plaintiff: "*Based upon the Plaintiff's conduct which the Court finds to be detrimental to the emotional and psychological welfare of her child . . . visitation should be subject to several conditions.*" (Emphasis added.) Thus, even were we to agree with plaintiff's contention that the court erred in concluding that plaintiff has "serious psychiatric problems," the result would be no different. The assignment of error is without merit.

Plaintiff next contends the court erred "in making numerous findings of fact which are unsupported and contrary to the evidence." In her argument in this regard, plaintiff asks this Court "to review the Record and the transcript for an absence of evidence, only as it deems necessary to the resolution of the issue of changed circumstances." This we have done, and we find no error.

[3] Finally plaintiff contends the court erred in its conclusion that plaintiff was in willful contempt of prior court orders. The court based its ruling in this regard on the following grounds:

A. The Plaintiff willfully violated this Court's Order of December 22, 1981, regarding visitations to be allowed to the Defendant.

O'Briant v. O'Briant

B. The Plaintiff willfully failed to appear as Ordered at the February 25, 1982 hearing.

C. The Plaintiff willfully failed to appear as Ordered at the hearing set for March 12, 1982.

D. The Plaintiff willfully attempted to avoid and ignore and circumvent the lawful Orders of this Court by violating the provisions of Chapter 50 and 50(a) of the Uniformed [sic] Code by filing an action in the State of Virginia.

"In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E. 2d 129, 139 (1978).

Our examination of the record reveals ample evidence supporting the court's finding that plaintiff repeatedly interfered with defendant's telephone visitation with Ronald, in violation of the court order dated 22 December 1981. That this violation was willful cannot be doubted in light of the evidentiary support for the court's finding that "[a] number of calls resulted in the phone being taken off the hook or answered and hung up." We also believe the court's findings regarding plaintiff's failure to appear for two scheduled hearings are supported by the evidence. The record shows that plaintiff had adequate notice in both instances: the order directing plaintiff to appear at the 25 February 1982 hearing was served on plaintiff on 17 February. Plaintiff's attorney, present in court on 25 February, was informed on that date that the case was continued until 12 March, and a copy of the order directing plaintiff to appear at the 12 March hearing was mailed to her and to her attorney on 3 March 1982. Plaintiff's contention that she may not be held in contempt for failure to attend hearings which were continued and thus did not take place, while novel, is entirely unpersuasive. It belabors the obvious to point out that plaintiff's failure to attend may well have been a factor in the court's decision to continue the case. In any event, the evidence supports the court's conclusion that plaintiff's failure to appear as ordered was willful and without lawful excuse. Finally we note that, contrary to plaintiff's contention, plaintiff had more than adequate notice that the question whether she should

O'Briant v. O'Briant

be held in contempt of prior court orders would be one of the subjects of the hearing beginning on 2 February 1983.

While we affirm the court's decision in relation to three of the four grounds outlined above, we reach a different result in regard to the fourth basis for the court's ruling. We are aware of no decision, and we are cited to none, holding that a person may be held in contempt for filing an action in another forum in the absence of a court order enjoining or prohibiting such conduct. If, as defendant contends, the trial court sought to hold plaintiff in contempt for "using the [Virginia] proceeding as a pretext for justifiable reasons in not coming to court as ordered" on 3 May 1982, the court should have identified plaintiff's failure to attend the 3 May hearing as the action violative of the prior court order. Thus, that portion of Judge LaBarre's order finding plaintiff in contempt for filing an action in Virginia and ordering her to serve thirty days in jail, conditioned on her compliance with all other provisions of the order, must be vacated.

The result is: that portion of the order entered 24 February 1983 awarding custody of the child to the defendant with limited and conditional visitation privileges to the plaintiff is affirmed; that portion of the order entered 24 February 1983 finding plaintiff in contempt of prior court orders on the three grounds discussed above and ordering her to serve thirty days in jail for each contemptuous act is affirmed; that portion of the order entered 24 February 1983 finding plaintiff in contempt for filing an action in Virginia is vacated.

Affirmed in part, vacated in part.

Chief Judge VAUGHN concurs.

Judge WELLS dissents in part.

Judge WELLS dissenting in part.

I dissent from that part of the majority opinion which affirms the trial court's finding plaintiff in contempt and sentencing her to 30 days in jail (two counts) for failing to obey the court's order to appear at hearings in the case. Whether plaintiff was found in criminal or civil contempt was not mentioned by the trial court,

Winston Realty Co. v. G.H.G., Inc.

but I do not agree that either would have been proper on these facts under the provisions of Chapter 5 of the General Statutes. In all other respects, I concur.

WINSTON REALTY COMPANY, INC., D/B/A WINSTON REALTY, INC., A CORPORATION v. G.H.G., INC., T/A SNELLING AND SNELLING, A NORTH CAROLINA CORPORATION

No. 8312SC790

(Filed 18 September 1984)

1. Unfair Competition § 1— employment agency—unfair trade practices—sufficiency of evidence

In plaintiff's action to recover for unfair trade practices, plaintiff's evidence supported the claim and verdict that defendant violated G.S. 95-47.6(2) and (9) by advertising that "pre-screened, qualified applicants" were quickly available through it, whereas the work experience and reliability of the applicants had neither been investigated nor verified; plaintiff's president testified that defendant's employee told him that an applicant's in-state references had been checked; and defendant admitted at trial that no such check was made.

2. Unfair Competition § 1— unfair trade practices—cause of plaintiff's damages

In an action to recover damages allegedly resulting from plaintiff's employment of a bookkeeper through defendant employment agency, evidence was sufficient to show that plaintiff's damages resulted from defendant's violation of the unfair trade practices statute where the evidence tended to show that plaintiff's president relied upon defendant's false representations in hiring a bookkeeper.

3. Unfair Competition § 1— unfair trade practices alleged—contributory negligence not a defense

Contributory negligence is not a defense in an unfair trade practices action. G.S. 75-1.1.

4. Unfair Competition § 1— employment agency—Unfair Trade Practices Act applicable

The Unfair Trade Practices Act applied to defendant's activities in recommending employees to plaintiff and other employers, and there was no merit to defendant's contention that the Act should apply only to buyer-seller relationships and competition between business competitors.

Judge HEDRICK dissenting.

Winston Realty Co. v. G.H.G., Inc.

APPEAL by defendant from *Johnson, Judge*. Judgment entered 12 April 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 3 May 1984.

Plaintiff sued for damages allegedly resulting from employing a bookkeeper through defendant employee placement agency. Plaintiff's owner and president, Thomas Etowski, testified that: He telephoned defendant's Fayetteville office about his need for a bookkeeper because of defendant's advertisement in the Fayetteville telephone directory and certain periodicals, which was as follows:

Snelling and Snelling, World's Largest Employment Service; Pre-screened, qualified applicants quickly available. Men and women for secretarial, office, clerical, administrative, technical, sales. If you're looking for a job or want to fill one: "WHERE TO CALL" Snelling and Snelling . . . 483-3671.

He described the job duties to one of defendant's employees, and another employee of defendant, Penny Davis, later telephoned him, stating that they had a qualified candidate for the position, one Mary Rebecca Skinner. After interviewing Ms. Skinner, he telephoned Penny Davis at the Snelling office and asked if Snelling had checked with Ms. Skinner's prior employers and other references and was told that they had checked the in-state references, but had not checked those out-of-state. Ms. Davis told him Ms. Skinner was highly qualified and highly recommended as a bookkeeper, and plaintiff hired her on 9 November 1979. As bookkeeper for his business, Ms. Skinner wrote and signed checks on company accounts, received rental payments, balanced the checkbook, verified bank statements, made bank deposits, and helped prepare the corporate tax returns. In July, 1980, Mr. Etowski discovered that some past due corporate tax returns had not been filed, the firm's rental escrow account was \$24,000 short, and some company records, including the bank statements, were missing. Confronted with this information and a demand that the records be produced, Ms. Skinner left the office and did not return. Etowski contacted the Cumberland County sheriff, who later informed him that Rebecca Skinner had a criminal record in that county for writing worthless checks, embezzlement, and forgery.

Winston Realty Co. v. G.H.G., Inc.

Upon being indicted for embezzling funds from the plaintiff corporation, Ms. Skinner pled guilty and was sentenced to prison for a term of ten years. At trial the evidence also showed that: Though Ms. Davis had questioned Ms. Skinner about her technical qualifications and work experience, defendant's employees had not contacted any of Ms. Skinner's former employers or other references and had not otherwise investigated her criminal record or reputation for either honesty or efficiency. One of Ms. Skinner's former employers, a Fayetteville concern whose name was listed on the resume Ms. Skinner furnished defendant, had caught Ms. Skinner embezzling company funds and had prosecuted her for it.

In filing suit, plaintiff alleged that defendant negligently failed to investigate the background and references of Ms. Skinner and violated G.S. 95-47.6(2) and (9), which prohibits private personnel agencies from advertising falsely or giving misleading information to employers, and G.S. 75-1.1, North Carolina's Unfair Trade Practices Act. The issues submitted to the jury were in two sections, one for the negligence claim and the other for the Chapter 75 unfair trade practices claim, and were answered as indicated:

I. Negligence Issues:

Issue Number One (1):

Was the Plaintiff, Winston Realty Co., Inc., damaged by the negligence of the Defendants, G.H.G., Inc., t/a Snelling and Snelling?

ANSWER: YES

Issue Number Two (2):

Did the Plaintiff, Winston Realty Co., Inc., by its own negligence contribute to its damage?

ANSWER: YES

II. Chapter 75. Issues:

Issue Number Three (3):

Did the Defendant, G.H.G., Inc., t/a Snelling and Snelling, do one or more of the following:

Winston Realty Co. v. G.H.G., Inc.

(a). Publish or cause to be published false or fraudulent information, representation, promise, notice or advertisement:

(b). Knowingly make a false or misleading promise or representation or give false or misleading information to the Plaintiff in regard to employment, work or position, its nature, location, duration, compensation, or the circumstances surrounding any employments, work or position including the availability thereof.

ANSWER: YES

Issue Number Four (4):

Was Defendant's conduct in commerce or did it affect commerce?

ANSWER: YES

Issue Number Five (5):

Was Defendant's conduct a proximate cause of the damage to plaintiff's business?

ANSWER: YES

III. Issue Number Six (6):

What amount, if any, is the Plaintiff, Winston Realty Co., Inc., entitled to recover?

ANSWER: \$19,000.00

The court ruled that the facts found by the jury constituted an unfair and deceptive trade practice and trebled the damages pursuant to G.S. 75-16; but denied plaintiff's prayer for attorney's fees pursuant to G.S. 75-16.1. From the judgment so entered for plaintiff, defendant appeals.

Reid, Lewis & Deese, by Marland C. Reid, for plaintiff appellee.

Russ, Worth, Cheatwood & McFadyen, by Philip H. Cheatwood, for defendant appellant.

Winston Realty Co. v. G.H.G., Inc.

PHILLIPS, Judge.

Defendant first contends that the trial court committed reversible error in allowing plaintiff's witness, Thomas Etowski, to testify as to his interpretation of the word "pre-screen," as used in defendant's yellow page advertisement. The contention is that it was up to the court to determine the meaning of the word as a matter of law. We disagree. First of all, the testimony objected to, instead of an interpretation of anything, mostly stated the witness's understanding of defendant's function, which was appropriate under the circumstances that existed. The following is an example: "I understand the function of the personnel agency was that they were going to do the checking, the screening, the verifying of the information so that when I, as an employer, was hiring someone . . . I didn't have to do all that." Furthermore, the meaning that defendant relies on—an unidentified dictionary definition of the word "screen," which defendant introduced into evidence—is itself incomplete, if not indefinite. Of the several definitions stated on the exhibit, the only one possibly applying to this case is: "To interview or test in order to separate according to skills, personality, aptitudes, etc." The "etc.," of course, adds other characteristics along the same lines as skills, personality, and aptitudes to the definition; and under the circumstances, whether defendant's advertisement that it had "[p]re-screened, qualified" bookkeepers available for early employment implied that the applicant's work experience and reliability had been checked was a question of fact, rather than law. Finally, even if the witness's testimony be construed as an interpretation that the word pre-screened meant that the references and work experience of applicants had been checked, plaintiff's evidence that defendant's employee expressly represented that Ms. Skinner's in-state references had been checked rendered the interpretation harmless in any event.

[1] Defendant next contends that its motions for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence should have been granted for three reasons: First, because the Chapter 75 unfair trade practices claim is based on defendant violating G.S. 95-47.6(2) and (9), which forbids false advertising by personnel agencies, and the evidence shows no such violation; second, even if the evidence tends to show defendant violated the statute, it does not show that plaintiff's damages

Winston Realty Co. v. G.H.G., Inc.

resulted therefrom; and, third, even if defendant's violation of the statute was a proximate cause of plaintiff's damages, plaintiff's claim is nevertheless barred because of its own contributory negligence, which the verdict established. The statutory provisions defendant allegedly violated follow; the portions of Chapter 75 that they relate to will be set forth later:

§ 95-47.6. Prohibited acts.

A private personnel service shall not engage in any of the following activities or conduct:

. . . .

- (2) Publish or cause to be published any false or fraudulent information, representation, promise, notice or advertisement.

. . . .

- (9) Knowingly make any false or misleading promise or representation or give any false or misleading information to any applicant or employer in regard to any employment, work or position, its nature, location, duration, compensation or the circumstances surrounding any employment, work or position including the availability thereof.

For the reasons stated in addressing defendant's first assignment of error, it is quite plain, we think, that plaintiff's evidence supported the claim and verdict that defendant violated G.S. 95-47.6(2) by advertising that "[p]re-screened, qualified applicants" were quickly available through it, whereas the work experience and reliability of the applicants had been neither investigated nor verified. And in dwelling just on the false advertisement part of the claim and verdict, defendant is mistaken. Independently, as Issue Number Three (b) shows, was the charge that defendant violated G.S. 95-47.6(9) by knowingly making false or misleading representations or giving false or misleading information to plaintiff concerning the employment. This separate claim and the verdict on this issue was supported by Mr. Etowski's testimony that Ms. Davis told him Ms. Skinner's in-state references had been checked and by defendant's admission that no such check was made.

Winston Realty Co. v. G.H.G., Inc.

[2] The defendant's contention that plaintiff's damages did not proximately result from the misinformation received likewise fails. The proximate cause issue, nearly always a question of fact, rather than law, was properly submitted to the jury. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271 (1980). Plaintiff's witness testified that he relied upon defendant's false representations in hiring Rebecca Skinner. From that evidence, the jury was at liberty to conclude that some of plaintiff's damages, at any rate, proximately resulted from the representations so made. The verdict also indicates that the jury concluded that some of the damages claimed did not proximately flow from the misrepresentations. We do not believe the verdict should be disturbed.

[3] The contention that contributory negligence is an absolute defense to a Chapter 75 action is also rejected. What contributory negligence is an absolute defense to, and all it is a defense to, as Judge Johnson correctly ruled, is a claim based on negligence. But Chapter 75 actions are not based upon negligence; they are based upon "unfair or deceptive acts or practices in or affecting commerce," which the General Assembly has made unlawful. G.S. 75-1.1. In regard to this, our Supreme Court said:

A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers . . . [a]n act or practice is deceptive . . . if it has the capacity or tendency to deceive.

Johnson v. Phoenix Mutual Life Insurance Co., 300 N.C. 247, 263, 265, 266 S.E. 2d 610, 621-2 (1980). After discussing the history of this Act and observing that the legislative intent was to establish an effective private cause of action for aggrieved consumers in this State because common law remedies had often proved ineffective, our Supreme Court remarked:

If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public. Consequently, good faith is not a defense to an alleged violation of G.S. 75-1.1.

Winston Realty Co. v. G.H.G., Inc.

Marshall v. Miller, 302 N.C. 539, 548, 276 S.E. 2d 397, 403 (1981). For similar reasons, it seems plain that the Legislature did not intend for violations of this Chapter to go unpunished upon a showing of contributory negligence. If unfair trade practitioners could escape liability upon showing that their victims were careless, gullible, or otherwise inattentive to their own interests, the Act would soon be a dead letter.

[4] Defendant finally contends that, as a matter of law, Chapter 75 does not apply to its activities in this case and the judgment to the contrary should therefore be set aside. The argument, in gist, is that the Chapter applies only to buyer-seller relationships and competition between business competitors. Certainly, the parties were not in competition with each other and defendant made no sale to plaintiff. Defendant just recommended that plaintiff employ Ms. Skinner, one of its supposedly qualified applicants, and its compensation was not received from plaintiff, but from Ms. Skinner after plaintiff employed her. Nevertheless, we believe that defendant's activities were subject to the Chapter. In pertinent part, G.S. 75-1.1 provides as follows:

75-1.1. Methods of competition, acts and practices regulated; legislative policy.

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

. . . .

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

The breadth and scope of these provisions requires no elaboration, and we are of the opinion that defendant's activities were covered by them. In recommending employees to plaintiff and other employers defendant certainly was engaged in business and its activities obviously affected commerce. On this subject, our

Winston Realty Co. v. G.H.G., Inc.

Supreme Court has said, "[c]ommerce' in its broadest sense comprehends intercourse for the purposes of trade in any form." *Johnson v. Phoenix Mutual Life Insurance Co.*, *supra*. No doubt, because the Act is so broad and comprehensive, the Legislature specifically excluded members of a learned profession from its application, but it has not excluded employment agencies, and defendant has not shown that it is exempt. We therefore hold that Chapter 75 does apply to defendant's activities in this case and overrule this assignment of error also.

No error.

Judge ARNOLD concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

In paragraph eleven of its amended complaint, plaintiff alleged that defendant engaged in an "unfair and deceptive act or practice affecting commerce" in violation of N.C. Gen. Stat. Sec. 75-1.1, and prayed that any damages be trebled pursuant to G.S. 75-16. The court did not submit an issue to the jury, however, as to whether defendant did in fact engage in an unfair or deceptive act or practice in its dealings with the plaintiff. Issues 3(a) and (b), set out in the record and in the majority opinion, are couched in the language of the rules and regulations governing the operation of private personnel services described in G.S. 95-47.6(2) and (9). It appears that the trial court entered a judgment based on a finding that the defendant had violated the provisions of G.S. 95-47.6(2) and (9). A party violating these statutes is subject to punishment by the Commissioner of Labor by means of warnings, a fine of up to \$250.00, and suspension or revocation of the license of the private personnel service. While evidence that defendant violated these statutes might also support a finding that defendant engaged in an unfair or deceptive act or practice in violation of G.S. 75-1.1, the court, in my opinion, has no authority to enter a judgment pursuant to Chapter 75 on a verdict disclosing only a violation of Chapter 95. In short, the issues submitted to the jury do not resolve the controversy between the parties raised by the pleadings and the evidence with respect to whether defendant

In re Johnson

engaged in an unfair or deceptive act or practice. I vote to award the defendant a new trial.

IN THE MATTER OF: ANGEL LA'STAR JOHNSON, A MINOR CHILD, DEPARTMENT OF SOCIAL SERVICES v. SYLVIA ANN JOHNSON, MOTHER, AND WILLIE JOHNSON, JR., FATHER

No. 8326DC841

(Filed 18 September 1984)

1. Parent and Child § 1— termination of parental rights—custody and support—insufficiency of evidence

The trial court erred in ruling that parental rights should be terminated on the grounds that the parents had willfully left the child in foster care for more than 2 consecutive years without taking certain corrective actions and that the parents had failed to provide any support for the child for 6 months preceding the action, since the mother had custody of the child 18 months before the termination proceeding, and since the trial court made no finding that the parents had the ability to pay any amount greater than zero toward the cost of child care. G.S. 7A-289.32.

2. Parent and Child § 1— termination of parental rights—neglect—sufficiency of evidence

Evidence was sufficient to support the trial court's finding that a child was neglected and that finding supported its conclusion that parental rights should be terminated where the evidence tended to show that the child had received treatment for scalding, a broken bone, and a head injury; the parents failed to make progress in correcting their problems between 1979, when it was originally stipulated that the child was neglected, and 1982, when the order terminating parental rights was entered; marital difficulties between the parents persisted; the child was placed in the mother's custody on a trial basis, and there were three abuse or neglect referrals during the trial placement; on one occasion the child had bruises for which the mother gave conflicting explanations; the parents failed to demonstrate a commitment to regaining custody in their interactions with the department of social services and other service agencies; and the parents failed to pay any support in the past six months. G.S. 7A-517(21).

APPEAL by respondents from *William G. Jones, Judge*. Judgment entered 3 December 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 4 May 1984.

In re Johnson

Randall W. Lee for respondent appellant Sylvia Ann Johnson.

Hamel, Hamel & Pearce, by Richard A. Elkins, for respondent appellant Willie Johnson, Jr.

Ruff, Bond, Cobb, Wade & McNair, by Moses Luski, for petitioner appellee Mecklenburg County Department of Social Services.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Max E. Justice, guardian-ad-litem for the minor child appellee.

BECTION, Judge.

I

This is a termination of parental rights case.

The minor child Angel Johnson was born in February 1979, the second child of Willie Johnson, Jr. and Sylvia Ann Johnson. Following three incidents, after which Angel Johnson received treatment for scalding, a broken bone, and a head injury, the Mecklenburg County Department of Social Services (DSS) filed neglect petitions as to Angel and her older sister in July 1979. Hearings in October and December 1979 resulted in the voluntary dismissal of the petition as to the older child, but also in a stipulation and ruling that Angel Johnson was a neglected child. This adjudication arose from the above physical abuse and from a pattern of discord and aggression between the parents. DSS obtained temporary custody; the parents agreed to participate in counseling and parent training, as well as to pay child support.

A review hearing took place in June 1980, and the court found that the parents were making satisfactory progress and that it would serve the best interest of the child for custody to be returned to her parents. Since the child was to have heart surgery shortly thereafter, however, the court did not order transfer of custody.

In November 1980, at a second review hearing, the court found that although unsupervised visits with the parents had gone well, the parents had recently separated. The separation caused domestic instability and thus interrupted the parents' joint efforts to resume full custody. The court directed trial placement solely with the mother, to begin in January 1981.

In re Johnson

During the trial placement, the father moved back in with the mother, and they resumed their pattern of cohabitation, discord, separation and reconciliation. The mother missed numerous appointments for parent counselling and child therapy. The child was occasionally left with relatives. On one occasion the child had heavy bruises and scratches. At other times, relatives noted that she was wet, cold, and poorly clothed. The court concluded, at hearing in July 1981, that the "good faith trial placement" had failed and ordered DSS to resume custody, although it found that the home of the parents should still be considered as a possible permanent home. The court ordered a psychological exam for both parents.

The court conducted another review hearing in November 1981. Based on the psychological evaluations, which indicated that additional counselling and training were needed but gave no prognosis as to the likely success thereof, and based on the past history of marital instability, the court concluded that it could no longer look to the natural parents as custodians "in the near term." The court ordered that custody be awarded to the child's paternal aunt and uncle, and indicated that the parents must show "positive results" in order to be considered again as active participants in the permanent plan.

The foster caretakers notified the court in April 1982 that they no longer wanted custody. They had experienced continual difficulty in controlling the child, particularly after visits with the mother, when the child would cry for her mother. In addition, several incidents had occurred reflecting tension with the mother's relatives and the mother herself. Two weeks later, DSS filed a petition to terminate the parents' rights. In response, both parents requested custody as individuals. After a lengthy hearing, the court terminated their parental rights. It found that although the parents had originally made sufficient progress toward regaining custody to impress the court at times, the court was more impressed by the number of relapses into discord and failures to cooperate with community services. The most recent separation had occurred only five days before the commencement of hearing. The court adopted the findings supporting its original adjudication of neglect in 1979. In addition, the court found that the parents had failed to meet their child support obligations. Concluding that these matters had been shown by clear, cogent,

In re Johnson

and convincing evidence, the court terminated the parents' rights. They appeal.

II

The parents appeal *in forma pauperis*. However, both failed to file their affidavits within ten days from the expiration of the session of court, as required by N.C. Gen. Stat. § 1-288 (1983). The provisions of the statute are mandatory and jurisdictional, and the purported appeal is subject to dismissal. *Anderson v. Worthington*, 238 N.C. 577, 78 S.E. 2d 333 (1953). DSS and the guardian have moved to dismiss the appeal. Since we, in our discretion, choose to treat the appeal as an application for writ of certiorari and allow same, the motion is moot and we proceed to the merits. N.C. Gen. Stat. § 7A-32(c) (1981); 4A N.C. Gen. Stat. App. 2A, N.C.R. App. P. 21(a) (Supp. 1983).

III

Parental rights may be terminated in North Carolina under N.C. Gen. Stat. §§ 7A-289.31, -289.32 (1981). G.S. § 7A-289.32 (1981) lists seven grounds which may support an order of termination; finding any one of them will authorize a court to terminate the parents' rights. G.S. § 7A-289.31(a) (1981); *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed sub nom. Moore v. Guilford County Dep't of Social Services*, 459 U.S. 1139, 74 L.Ed. 2d 987, 103 S.Ct. 776 (1983). All such findings must, however, be based on "clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7A-289.30(e) (1981).

[1] In its order of termination the trial court ruled that DSS had properly proved the following statutory grounds for termination:

- (2) The parent has abused or neglected the child.
- (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the paren-

In re Johnson

tal relationship to the child or to make and follow through with constructive planning for the future of the child.

- (4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

G.S. § 7A-289.32 (1981).

Since it is undisputed that the mother had the child on trial placement up to July 1981, the court clearly erred as a matter of law in finding ground (3) in December 1982. The fact that DSS retained legal custody during the trial placement is irrelevant; the controlling language is "foster care." Clearly "foster care" does not include trial placement with the natural parents. With respect to ground (4), the trial court made no finding that the parents had the ability to pay any amount greater than zero toward the cost of care. Such findings are required for orders based on that ground. *In re Moore*, 68 N.C. App. 300, 314 S.E. 2d 580 (1984); *In re Bradley*, 57 N.C. App. 475, 291 S.E. 2d 800 (1982). We therefore may affirm only if the trial court properly found ground (2), neglect.

IV

[2] A court may terminate parental rights upon a finding that the parent has neglected the child. G.S. § 7A-289.32(2) (1981). The child is deemed neglected if found to be a neglected child within the meaning of N.C. Gen. Stat. § 7A-517(21) (1981), which, as relevant here, defines a neglected child as one who "does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to his welfare. . . ." See *In re Allen*, 58 N.C. App. 322, 293 S.E. 2d 607 (1982). These provisions do not violate constitutional standards of equal protection or definiteness. *In re Huber*, 57 N.C. App. 453, 291 S.E. 2d 916, *disc. rev. denied and appeal dismissed*, 306 N.C. 557, 294 S.E. 2d 223 (1982).

The stipulation, made in October 1979, that the minor child was neglected, apparently constituted significant evidence of

In re Johnson

neglect, and it should have—the inference of violent conduct toward the child resulting in a fractured right arm and a subdural hematoma understandably concerned the trial court. The courts of this State have consistently recognized stipulations as binding judicial admissions, which dispense with and substitute for the necessity of legal proof. *Hargus v. Select Foods, Inc.*, 271 N.C. 369, 156 S.E. 2d 737 (1967); *Ritch Realtors, Inc. v. Kinard*, 45 N.C. App. 545, 263 S.E. 2d 38, *disc. rev. denied*, 300 N.C. 375, 267 S.E. 2d 677 (1980). Stipulations ordinarily remain in effect through the duration of the controversy. *In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 249 S.E. 2d 698 (1978).

But that's not all. The trial court, in determining to terminate parental rights, reviewed the entire file which, commendably, included no less than twelve meticulously drafted orders notably detailing the parents' lack of progress between the initial juvenile petition in 1979 and the order terminating parental rights in 1982.

In addition, the trial court also adopted its findings made in 1979 regarding the physical injuries sustained by the child. Equally important, it also found: that the marital difficulties between the parents had persisted; that there were three abuse or neglect referrals during the trial placement; that on one occasion the child had bruises for which the mother gave conflicting explanations; that the parents had failed to demonstrate a commitment to regaining custody in their interactions with DSS and other service agencies; and that they had failed to pay any support in the past six months. Even excepting "marital difficulties" from our consideration, on balance the evidence is nevertheless sufficient to support the trial court's finding that the parents had neglected the child, particularly in light of our Supreme Court's recent decision in *In re Ballard*, No. 485A83, filed 28 August 1984. The *Ballard* Court held that

evidence of neglect by a parent prior to losing custody of the child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights . . . [as long as the trial court does not erroneously treat] the prior adjudication of neglect standing alone as binding upon it and as determinative on the issue of neglect at the time of the termination proceedings.

In re Johnson

In re Ballard, slip opinion at pp. 8, 9, 311 N.C. 708, 715, 319 S.E. 2d 227, 232 (1984). See also *In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984) (prior adjudication of neglect, separation, other factors sufficient).

In this case, there was ample evidence that the child did not receive "proper care" and lived in an environment "injurious to her welfare" at the time of the original adjudication of neglect. Equally important, there was evidence that the child did not receive proper care during trial placement (three abuse or neglect referrals) and that the unstable environment would persist in that her parents "failed to maintain a sustained commitment to Angel Johnson . . . [and] have been unwilling to make the changes in their lifestyle and to obtain the skills which the court feels would be necessary for them to have their child returned." Termination order, finding of fact no. 7. Indeed, the father never made himself available for counseling, and the mother's attendance at counseling sessions, after June 1980, were sporadic even though she worked two blocks from the counselor's office and the appointments were scheduled after the mother's working hours. Following *Ballard*, we conclude that this constituted clear, cogent, and convincing evidence of neglect, and the trial court accordingly complied with the statutory provisions in terminating parental rights for neglect.

Following loss of custody, parents likely will not have extensive contact with the child; therefore, new evidence of neglect will, of course, be limited. The more diligent, and hence time-consuming, the efforts of DSS to restore the family unit, the less new evidence there will be. We hesitate to adopt a rule that would encourage DSS to accelerate termination proceedings. The General Assembly has clearly expressed its intent that, to the contrary, unnecessary severance of the family bond is to be avoided. N.C. Gen. Stat. § 7A-289.22(2) (1981). In this case, there was new evidence and new findings. A trial placement was attempted, and, as the trial court found, it deteriorated.

The parents, relying on our decision in *In re Montgomery*, 62 N.C. App. 343, 303 S.E. 2d 324 (1983), *rev'd*, 311 N.C. 101, 316 S.E. 2d 246 (1984), contend that there was substantial evidence of love and affection, particularly between mother and child, and that the trial court erred in failing to address this evidence in its findings.

Colony Hill Condominium I Assoc. v. Colony Co.

However, the Supreme Court, in reversing, expressly rejected our ruling that specific findings as to these intangibles need be made. The Supreme Court held that the provisions of the termination statutes, in particular the discretionary power of the trial court to keep the family together even when it could properly terminate, *see* N.C. Gen. Stat. § 7A-289.31(a)-(b) (1981), provided an appropriate forum for the consideration of these intangible factors.

V

We therefore hold that the court properly found that parental rights should be terminated. Its findings of neglect are supported by clear, cogent, and convincing evidence, and the order appealed from is therefore

Affirmed.

Judges WELLS and JOHNSON concur.

COLONY HILL CONDOMINIUM I ASSOCIATION, COLONY HILL CONDOMINIUM I, BOARD OF DIRECTORS OF COLONY HILL CONDOMINIUM I ASSOCIATION, LARRY FERRELL, JENNIE B. FERRELL, JOEL PULEO, ELLEN PULEO, CHRISTINE A. LONG, JUDITH I. WOODBURN, MARY A. BROWN, DONALD P. VANDAYBURG, DOROTHY VANDAYBURG, U. S. FIRE INSURANCE COMPANY, CRUM & FORSTER INSURANCE GROUP, QUINCY MUTUAL FIRE INSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY v. COLONY COMPANY, A PARTNERSHIP; FRED J. HERNDON, WILLIAM C. SPANN, INDIVIDUALLY, AND T/A HERNDON CONSTRUCTION COMPANY; MARTIN STAMPING AND STOVE COMPANY; MARTIN INDUSTRIES, INC.; HERNDON BUILDING COMPANY

No. 8314SC1071

(Filed 18 September 1984)

1. Limitation of Actions § 4.2; Negligence § 20— negligence in building condominium—action barred by statute of repose

In an action to recover damages arising from a fire in a building housing plaintiffs' condominiums, the statute of repose barred their claims against defendant builders even before the injury occurred, since the version of G.S. 1-50(5) effective from 1963 until 1 October 1981 was applicable to plaintiffs' claims; that statute provided a six-year limit on actions arising out of defective or unsafe improvements to real property; and there was no exception for wilful and wanton negligence in constructing the improvements.

Colony Hill Condominium I Assoc. v. Colony Co.

2. Sales § 2— defective prefabricated fireplace—action barred by statute of repose

Plaintiffs' claims against defendant manufacturers of a prefabricated fireplace were barred by G.S. 1-50(6), which provides that claims arising out of defective products must be brought within six years of date of initial purchase, since the fireplace was purchased between 25 January 1973 and 27 September 1973, and plaintiffs' potential claims for damages arising out of a defect in the fireplace were thus barred at the latest in September 1979, even before their injury occurred on 20 December 1979.

APPEAL by plaintiffs from *Clark, Judge*. Judgment entered 22 June 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 21 August 1984.

This suit arises out of a fire which extensively damaged Building 3062 of the Colony Hill Condominiums in Durham. Its source was a prefabricated fireplace in Unit 3062A, a condominium owned by Jean Breckenridge. Ms. Breckenridge started a fire in the fireplace on the evening of 20 December 1979. The fire apparently drafted improperly and escaped through a crack in the front of the fireplace where the firebox met the decorative surround. Whether Breckenridge used artificial logs in building the fire and what caused the crack in the fireplace are matters of dispute. The fire spread inside the wall and up to the attic and then across to the adjacent condominiums. The absence of adequate fire stops and proper fire walls permitted the fire to spread rapidly through the building and to damage extensively other condominium units. Damage was estimated at \$200,000.

Plaintiffs commenced this action by filing a summons on 21 December 1981 and a complaint on 8 March 1982. Plaintiffs include all of the individual owners of condominium units in Building 3062 except Jean Breckenridge, the insurance company that paid the condominium association for its casualty loss, the insurance companies of the individual claimants, the Colony Hill Condominium I Association, and the Board of Directors of the Colony Hill Condominium Association. Plaintiffs sued the developers and builders of the condominium units (referred to collectively as defendant-builders): Colony Company, a partnership formed by Fred J. Herndon and William C. Spann, and Herndon and Spann, individually, and T/A Herndon Construction Company. Plaintiffs also sued the manufacturers of the prefabricated fireplace, Martin Stamping and Stove Company and Martin Industries, Inc.

Colony Hill Condominium I Assoc. v. Colony Co.

Plaintiffs sought to recover damages incurred in the fire loss, alleging that defendant-builders were negligent in the construction of the condominium project and installation of the fireplace, and in the failure to instruct the owners of the condominium units with regard to the use of the fireplaces. Plaintiffs allege also that the defendant-manufacturers were negligent in the design, construction, and instruction for the use of the fireplaces installed in the condominiums. Finally, plaintiffs allege that defendant-builders and defendant-manufacturers breached express warranties as well as implied warranties of merchantability and of fitness for a particular purpose.

At a hearing on 20 June 1983 the Honorable Giles R. Clark concluded that plaintiffs' claims against all defendants were barred by applicable statutes of repose and granted defendants' motions for summary judgment. From these proceedings plaintiffs appeal.

Haywood, Denny and Miller, by Stewart W. Fisher, for plaintiff appellants.

Moore, Ragsdale, Liggett, Ray and Foley, by Peter M. Foley and Nancy D. Fountain, for defendant appellees Martin Stamping and Stove Company and Martin Industries, Inc.

Spears, Barnes, Baker and Hoof, by John C. Waino and Craig B. Brown, for defendant appellees Colony Company, Fred J. Herndon, William C. Spann, Herndon Construction Company and Herndon Building Company.

ARNOLD, Judge.

The primary issue on appeal is whether the trial court properly granted summary judgment against the plaintiffs on the grounds that their claims are barred by statutes of repose, G.S. 1-50(5) and G.S. 1-50(6). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980). Whether a statute of repose has expired is strictly a legal issue, *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E. 2d 868, 871-72 (1983), and if the pleadings or proof show without contradiction that it has expired, then summary judgment may be granted.

Colony Hill Condominium I Assoc. v. Colony Co.

1. Plaintiffs' Claims Against the Defendant-Builders

[1] Plaintiffs contend that the present version of G.S. 1-50(5), effective 1 October 1981, applies to their negligence claims. This statute provides generally that:

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement. G.S. 1-50(5)(a).

Subsection (e) of the statute prevents any person guilty of wilful or wanton negligence in constructing an improvement to real property from asserting the six-year limit on actions arising out of the improvement. Plaintiffs argue that defendant-builders were guilty of such wilful and wanton behavior and therefore may not plead the statute of repose.

The statute of repose applicable to plaintiffs' claims, however, is not the present version of G.S. 1-50(5), but the version effective from 1963 until 1 October 1981 ("the 1963 statute"). See 1963 N.C. Sess. Laws c. 1030. That statute provided, in pertinent part:

- (5) No action to recover damages for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction.

It had no exception preventing defendants guilty of wilful and wanton negligence from invoking the six-year time limit.

Under the 1963 statute, the plaintiffs' negligence claims were barred in 1979. The record shows that construction of Building 3062 of the Colony Hill Condominiums was completed, at the

Colony Hill Condominium I Assoc. v. Colony Co.

latest, by December, 1973. Under the 1963 statute, then, plaintiffs had until December, 1979 to bring an action against the defendant-builders. They did not commence an action until 21 December 1981. The 1963 statute therefore barred their action nearly two years prior to passage of the 1981 statute of repose, and almost exactly two years before they brought suit. The 1963 statute, again, had no exception for wilful and wanton negligence.

The plaintiffs argue that the 1981 statute, with its subsection (e), operates retrospectively to revive plaintiffs' negligence claims. Once the 1963 statute of repose barred the plaintiffs' suit, however, a subsequent statute could not revive it. See *McCrater v. Stone & Webster Engineering Co.*, 248 N.C. 707, 104 S.E. 2d 858 (1958). A statute of repose, unlike an ordinary statute of limitations, defines substantive rights to bring an action. See *Bolick v. American Barmag Corp.*, 306 N.C. 364, 368, 293 S.E. 2d 415, 418 (1982). Filing within the time limit prescribed is a condition precedent to bringing the action. See *McCrater*, 248 N.C. at 709. Failure to file within that period gives the defendant a vested right not to be sued. *McCrater*, 248 N.C. at 709-10. Such a vested right cannot be impaired by the retroactive effect of a later statute. *Id.*

In enacting the statute of repose G.S. 1-50(5), the legislature defined a liability of limited duration. Once the time limit on the plaintiffs' cause of action expired, the defendants were effectively "cleared" of any wrongdoing or obligation. If we were to find that a later version of G.S. 1-50(5) operates retrospectively, then it must revive a liability already extinguished, and not merely restore a lapsed remedy. See *Danzer v. Gulf & Ship Island Railroad Co.*, 268 U.S. 633, 637 (1925); cf. *Campbell v. Holt*, 115 U.S. 620 (1885). Such a revival of the defendants' liability to suit, long after they have been statutorily entitled to believe it does not exist, and have discarded evidence and lost touch with witnesses, would be so prejudicial as to deprive them of due process, see *Danzer v. Gulf & Ship Island Railroad Co.*, 268 U.S. 633 (1925); *In re Alodex Corp. Securities Litigation*, 392 F. Supp. 672, 680-81 (S.D. Iowa 1975). While we are sympathetic with the plaintiff condominium owners, who find that the statute of repose barred their claims even before injury occurred, we cannot let our sympathies lead us to construe the statute so as to place an unconstitutional burden on the defendant-builders.

Colony Hill Condominium I Assoc. v. Colony Co.

Plaintiffs also contend that their cause of action is not barred by the statute of repose because defendants Fred Herndon and the Colony Company retained an ownership interest until 1977, thereby causing them to have a continuing duty to all owners until that date. Plaintiffs claim that they had until 1983, six years from the date defendants relinquished all ownership interest, to bring this action. In support of their contention, plaintiffs have submitted three deeds, one of which shows that defendants conveyed one of the units to its current owner in 1977. However, as the fire in question occurred in a structure entirely separate from that which contained the unit transferred in the 1977 deed, we find this conveyance to be irrelevant. In fact, from the deeds submitted, it appears that the latest date by which defendants could be charged with retaining an ownership interest in a unit located in the damaged building would be 22 January 1974. By this deed the six-year statute of repose would be tolled on 22 January 1980, still nearly two years before this action was filed.

The evidence submitted by plaintiffs shows that defendant-builders had no continuing interest in the condominium units where the fire occurred and, therefore, had no continuing duty to other owners. The case of *North Carolina State Ports Authority v. L. A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978), is not applicable to the case at bar. We hold that the trial court did not err in granting summary judgment on the negligence claims against the defendant-builders, as the action was barred by G.S. 1-50(5).

The plaintiffs' warranty claims against the defendant-builders are also covered by the statute of repose in that they are essentially actions to recover for damages to real property and arose out of "the defective and unsafe condition" of the condominium construction. They are therefore barred under the same analysis as above.

2. Plaintiffs' Claims Against the Defendant-Manufacturers

[2] Plaintiffs allege an array of claims against the defendant-manufacturers of the prefabricated fireplace. These include claims of breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of express warranty, and negligence in design of the fireplace and in

Colony Hill Condominium I Assoc. v. Colony Co.

failure to warn. We find that these claims all are subject to G.S. 1-50(6):

No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption. (Emphasis added.)

All the plaintiffs' claims against the defendant-manufacturers are for damage to property and are either "based upon" or "arise out of" an alleged defect or failure in relation to a product, the prefabricated fireplace. The generality of the language in Section 1-50(6) indicates that the legislature intended to cover the multiplicity of claims that can arise out of a defective product. See generally *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E. 2d 344 (1979), for a discussion of the relation between these various claims.

Section 1-50(6) became effective on 1 October 1979. It had retroactive effect upon claims which had not accrued (or had not been barred) by the date it went into effect. See *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982). The plaintiffs' claims had not accrued by 1 October 1979 because, as they assert, the defects in the prefabricated fireplace were hidden; the cause of action for the defect did not accrue until the defect became obvious, which in this case was the time of injury, 20 December 1979. Under Section 1-50(6), then, since the fireplace was purchased for use during the period 25 January 1973 to 27 September 1973, the plaintiffs' potential claims for damages arising out of a defect in it were barred at the latest in September 1979.

3. Constitutionality of the Repose Statutes

Plaintiffs contend that G.S. 1-50(6) is unconstitutional. In *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983), the North Carolina Supreme Court found G.S. 1-50(5) constitutional. This analysis applies to G.S. 1-50(6) as well, in that both are statutes of repose.

The decision of the trial court entering summary judgment in favor of all defendants is

Eagle's Nest, Inc. v. Malt

Affirmed.

Judges WHICHARD and EAGLES concur.

EAGLE'S NEST, INC. v. ROBERT C. MALT

No. 8328SC1135

(Filed 18 September 1984)

Mortgages and Deeds of Trust § 1.1— no obligation to redeem property—no equitable mortgage

In an action for a declaratory judgment to convert a deed previously executed to defendant into an equitable mortgage or deed to secure a debt, defendant was properly entitled to summary judgment where the materials before the court indicated that there were no redemption rights for the property in question other than an option to repurchase; plaintiff gave notice of its intent to exercise its option to repurchase but failed to do so; and the record indicated no obligation on the part of plaintiff to pay anything to defendant.

APPEAL by plaintiff from *Howell, Judge*. Judgment entered 10 August 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 24 August 1984.

Plaintiff, a Florida corporation, instituted this suit for declaratory judgment seeking to convert a deed previously executed to defendant, Robert C. Malt, into an equitable mortgage or deed to secure a debt. The following facts appear: Prior to 23 June 1981 plaintiff owned a tract of land with improvements thereon in Buncombe County. The land was encumbered with a purchase money deed of trust duly recorded in the Buncombe County Registry. Plaintiff had sought a loan from defendant to cure a default in the promissory note secured by the deed of trust.

On 23 June 1981 plaintiff executed a deed to defendant conveying the lands in controversy. The deed contained an exception whereby the defendant grantee assumed and agreed to pay the balance due under the purchase money note secured by the deed of trust in the sum of \$231,338.40. Revenue stamps were affixed to the deed in the sum of \$120,000.00, indicating a purchase price of \$120,000.00.

Eagle's Nest, Inc. v. Malt

Simultaneously, there was executed and recorded an option and lease agreement which provided generally as follows: Defendant Robert C. Malt granted to Eagle's Nest the exclusive option to purchase the lands involved in this controversy at any time beginning 1 July 1982 and expiring 24 December 1982 for the sum of \$412,000.00. On 24 December 1982 the option would lapse. During the period of the option, defendant had the responsibility for payment of ad valorem taxes and maintenance of fire, hazard, and liability insurance on the premises, together with the payment of principal and interest becoming due under the note secured by the deed of trust. Should defendant fail to make the payment, plaintiff could make such payments and apply the amounts paid as a reduction of the option purchase price. During the term of the option, defendant leased the premises to plaintiff for the sum of \$200.00 per month.

On or about 29 September 1982 plaintiff notified defendant that it intended to exercise its option on or about 13 December 1982. Plaintiff did not tender its option payment and began this suit on 20 December 1982. In its complaint as originally filed, plaintiff alleged that prior to delivery of the deed to the premises it negotiated with defendant for a loan which defendant agreed to make and to accept as security legal title to the tract of land described in the deed, subject to plaintiff's right to repay the indebtedness and to have legal title to the real estate revested in the plaintiff. Defendant answered, admitting that he owned the real estate and executed the option and lease agreement; that he paid plaintiff \$70,000.00 cash and assumed the balance due under the deed of trust in the sum of \$231,448.50; and that he has paid the indebtedness due thereunder together with the property taxes and fulfilled the other requirements set out in the option and lease agreement. The time to exercise the option having expired, defendant prays that he be declared the fee simple owner.

Plaintiff amended its complaint to spell out specifically the loan amounts due defendant, the repayment of principal plus interest to be paid on or before 24 December 1982, and those items making up the \$412,000.00 option price. To the amended complaint, plaintiff affixed a letter dated 5 June 1981 from its attorney addressed to the defendant and Herb Geller, president of Eagle's Nest, denoting the transaction as "Eagle's Nest, Inc. to Malt & Company Transaction," referring to documents enclosed

Eagle's Nest, Inc. v. Malt

in connection with the alleged loan. Defendant answered, admitting that the parties discussed a loan, but otherwise denying a loan was ever consummated. Thereafter, defendant filed a motion for summary judgment. On the basis of the pleadings, affidavits, and a deposition, summary judgment was granted in favor of defendant. Plaintiff appealed.

Carter and Kropelnicki, P.A., by Steven Kropelnicki, Jr. for plaintiff appellant.

Adams, Hendon, Carson & Crow, P.A., by James Gary Rowe for defendant appellee.

HILL, Judge.

The sole issue is whether the trial court erred in granting defendant's motion for summary judgment. We find that summary judgment was properly granted.

Upon motion a summary judgment will be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). The party moving for summary judgment has the burden of establishing the absence of a triable issue of fact. His papers are meticulously scrutinized and all inferences are decided against him. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). In ruling on a motion for summary judgment, the court will not decide issues of fact. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). "However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 524, 180 S.E. 2d 823, 830 (1971).

Applying these basic tenets to the case under review, we address plaintiff's contention that summary judgment was improperly granted. Plaintiff concedes that the deed, standing alone, establishes fee simple ownership in the defendant; and the materials filed by defendant, standing alone and uncontradicted, establish defendant's right to summary judgment. However, plaintiff contends that its opposing materials established a material fact in issue: whether defendant holds title to the real estate as an equitable mortgagee rather than as an owner in fee simple.

Eagle's Nest, Inc. v. Malt

The term "equitable mortgage" is used as a catchall term to connote all of the transactions which, despite peculiarities of form or the appearance of a non-security deal, are given the effect of a mortgage when examined by a court with equitable powers. Thompson on Real Property, § 4711. Justice Devin, speaking for the court in *Ricks v. Batchelor*, 225 N.C. 8, 11, 33 S.E. 2d 68, 70 (1945), quoting *Ferguson v. Blanchard*, 220 N.C. 1, 16 S.E. 2d 414 (1941) and *O'Briant v. Lee*, 212 N.C. 793, 195 S.E. 15 (1938), states that:

"when a debtor conveys land to a creditor by deed absolute in form and at the same time gives a note or otherwise obligates himself to pay the debt, and takes from the grantee an agreement to reconvey upon payment of the debt, the transaction is a mortgage. [citation omitted] But if the agreement leaves it entirely optional with the debtor whether he will pay the debt and redeem the land or not, and does not bind him to do so, or continue his obligation to pay, the relationship of mortgagor and mortgagee may not be held to continue unless the parties have so intended. . . . 'If it is a debt which the grantor is bound to pay, which the grantee might collect by proper proceedings, and for which the deed to the land is to stand as security, the transaction is a mortgage; but if it is entirely optional with the grantor to pay the money and receive a reconveyance, he has not the rights of a mortgagor, but only the privilege of repurchasing the property.'"

Justice Devin went on to say that

[w]hether any particular transaction amounts to a mortgage or an option of repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction is whether the debt existing prior to the conveyance is still subsisting or has been satisfied by the conveyance. If the relation of debtor and creditor still continues, equity will regard the transaction as a method of securing a debt—and hence a mortgage.

Ricks, supra at 11, 33 S.E. 2d at 70. It being apparent the deed and option to repurchase are regular on their faces, we look to the extrinsic evidence offered by the parties to determine if there is any obligation to repay.

Eagle's Nest, Inc. v. Malt

The letter dated 5 June 1981 from plaintiff's attorney to the defendant and Herb Geller, president of plaintiff corporation, contains the following:

Re: Eagle's Nest, Inc., to Malt & Company Transaction

Dear Herb:

I have enclosed several documents for the above transaction. To summarize their purpose, Malt intends to lend to Eagle's Nest the sum of \$70,000 on June 15, 1981, and another \$50,000 on April 15, 1982. Rather than effecting the standard loan and security arrangement, the parties have chosen to convey the security to the lender in fee simple; and the lender will simultaneously convey to the borrower an Option and Lease Agreement so that the borrower may recover the property upon liquidation of the loan and use the property during the term of the loan.

To achieve this, the following documents are required:

1. A general Warranty Deed from Eagle's Nest to Malt and Company. . . .
2. A Promissory Note and Deed of Trust evidencing Malt and Company's obligation to advance the further sum of \$50,000 on April 15, 1982. . . .
3. An Option and Lease Agreement. . . .
4. A Memorandum of Option and Lease Agreement. . . .

The documents dated 15 June 1981 and executed 23 June 1981 are between Eagle's Nest and the defendant. The grantee is Robert C. Malt, who is an individual, and not Malt and Company. The letter refers to a note and deed of trust as a part of the agreement and appears nowhere in the record before us. It would seem that the letter refers to a transaction other than the one which is the subject of this lawsuit.

In fact, defendant in his affidavit acknowledges that Herb Geller, president of Eagle's Nest, approached defendant and sought a loan to be secured by a mortgage on certain real estate holdings of the corporation in North Carolina. Defendant advised Mr. Geller that he was not interested in loaning money to Eagle's Nest or in holding a second mortgage from said corporation. The

Eagle's Nest, Inc. v. Malt

affidavit further reveals that Mr. Geller subsequently called and proposed to sell the property and that defendant give to Eagle's Nest an option to repurchase.

The affidavit of Ms. Vera Heflin reveals that she was present at a meeting between defendant and Mr. and Mrs. Herb Geller. At this meeting, the proposal for the purchase of real estate in Buncombe County, North Carolina, was discussed. Ms. Heflin took notes, and "[a]t no time did the parties discuss the loaning of money by Mr. Malt to Eagles Nest, Inc. in exchange for a mortgage, nor did the regulations include in any way treating the ongoing transaction as a loan."

If the moving party files papers, including testimonial affidavits, which show there is not a triable issue, the opposing party, pursuant to sections (e) and (f) of Rule 56, G.S. 1A-1, must file papers which show that there is a triable issue, or the moving party will be entitled to summary judgment. *Town of Atlantic Beach v. Young*, 58 N.C. App. 597, 293 S.E. 2d 821 (1982), *rev'd on other grounds*, 307 N.C. 422, 298 S.E. 2d 686 (1983); *Nye v. Lipton*, 50 N.C. App. 224, 273 S.E. 2d 313, *disc. rev. denied*, 302 N.C. 630, 280 S.E. 2d 441 (1981). Plaintiff attempts to rebut defendant's showing of no triable issue of fact with the affidavit of Norman Ferguson and the deposition of Scott Carter. The Ferguson affidavit is unsigned and unverified and cannot properly be considered by this court. G.S. 1A-1, Rule 56(e). The deposition of Mr. Carter contains reasons why defendant declined to treat the transaction as a loan, including capital gains tax advantages in lieu of ordinary interest income.

In addition, Mr. Carter testified there were no redemption rights other than an option to repurchase the property. In fact, Eagle's Nest gave notice of its intent to exercise its option to repurchase, but failed to do so. Mr. Carter secured an owner's title insurance policy insuring the interest of defendant as owner, not mortgagor. The policy showed no debt to defendant.

The record reflects no obligation on the part of Eagle's Nest to pay anything to defendant. We find no note or other evidence of debt which would require any payment to defendant. Eagle's Nest had a right to repurchase, not redeem, the property conveyed; but its rights were entirely optional. We conclude the deed conveyed the property to defendant, who owns the property free

State v. Walker

of any claim by Eagle's Nest. Therefore, defendant was entitled to judgment as a matter of law.

The summary judgment appealed from is

Affirmed.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA v. GARY LEE WALKER

No. 8326SC1242

(Filed 18 September 1984)

1. Searches and Seizures § 24— validity of warrant—credibility of informant

There was no merit to defendant's contention that an application for a search warrant failed adequately to establish the credibility of an informant where the officer testified that he had known the informant for five months and during this time the informant had given the officer information in reference to drug dealers in the area which the officer had found to be true; the informant freely admitted to the officer that he had used marijuana in the past and was familiar with how it was packaged and sold; and the informant stated that he had been in defendant's house within the past 48 hours and had seen marijuana.

2. Constitutional Law § 67— identity of informant—no right to disclose

In a prosecution of defendant for possession with intent to sell a controlled substance, the trial court did not err in denying defendant's motion for disclosure of the identity of a confidential informant.

Judge EAGLES concurring.

APPEAL by defendant from *Kirby, Judge*. Order entered 4 August 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 August 1984.

Defendant was indicted and charged with two counts of possession with intent to sell a controlled substance in violation of G.S. 90-95(a)(1). Defendant moved to suppress the evidence seized on the ground that the search warrant failed to adequately establish the credibility of the informant. In his affidavit for the search warrant, the police officer stated in substance that he had received information from a reliable informant; that the defendant

State v. Walker

had in his possession approximately three pounds of marijuana located in a house at 4501 Denver Avenue, Charlotte, North Carolina; that the informant had been in the house within the past 48 hours and had seen the marijuana; that the officer had known the informant for five months; that during this time the informant had made drug buys under the officer's supervision, and the informant had given information about drug dealers which the officer through investigation had found to be true.

At the hearing on defendant's motion to suppress, the trial court concluded that the affidavit provided probable cause for the issuance of a search warrant. Defendant appeals the denial of his motion to suppress as provided in G.S. 15A-979(b) and the denial of his motion to identify the confidential informant after having pleaded guilty to two counts of possession with intent to sell a controlled substance.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Myron C. Banks for the State.

Elam, Seaford, McGinnis & Stroud, by William H. Elam for defendant appellant.

HILL, Judge.

[1] Defendant first contends the application for the search warrant failed to adequately establish the credibility of the informant, and the court erred in denying his motion to suppress. Defendant attacks the finding of probable cause in that (1) the officer's affidavit did not state that information from the informant had ever led to previous search warrants, arrests or convictions; and (2) the affiant did not personally observe the informant exit defendant's residence with marijuana.

We have no difficulty in finding that probable cause existed for issuance of the search warrant. The United States Supreme Court in *Illinois v. Gates*, --- U.S. ---, 103 S.Ct. 2317, 76 L.Ed. 2d 527, *reh'g denied*, --- U.S. ---, 104 S.Ct. 33, 77 L.Ed. 2d 1453 (1983), set forth the "totality of the circumstances analysis" standard for determining probable cause for issuance of a search warrant based on information from informants.

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circum-

State v. Walker

stances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at ---, 103 S.Ct. at 2332, 76 L.Ed. 2d at 548. In the recent case of *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984), our Supreme Court ratified the rule in *Gates, supra*, which established the "totality of circumstances analysis."

In the case under review, the officer testified that he had known this informant for five months and during this time the informant had made purchases of controlled substances under his direct supervision; that the informant had given the officer information in reference to drug dealers in the Charlotte area which the officer had found to be true through investigations concluded through the officer; that the informant freely admitted to the officer that he had used marijuana in the past and is familiar with how it is packaged and sold; and that the informant stated he had been in defendant's house within the past 48 hours and had seen marijuana. The "totality of the circumstances analysis" standard which mandates a "practical, common sense" determination of probable cause leads us to believe that there was sufficient evidence of the presence of the drug as the informant indicated to support issuance of the warrant.

The search of defendant's premises was made under a search warrant. A search made pursuant to a valid search warrant is prima facie evidence of the reasonableness of the search warrant within the meaning of the Fourth Amendment. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E. 2d 689 (1972). A search warrant is presumed to be valid unless irregularity appears on its face. *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972). If defendant had evidence to rebut the presumption of validity of the warrant, it was his obligation to go forward with his evidence. *State v. Gibson*, 32 N.C. App. 584, 233 S.E. 2d 84 (1977). Defendant's evidence is simply a denial that any male had been in his home for 48 hours prior to the search. See *State v. Dorsey*, 60 N.C. App. 595, 299 S.E. 2d 282, *disc. rev. denied*, 308 N.C. 192, 302 S.E. 2d 245

State v. Walker

(1983). Such testimony is insufficient to rebut the presumption of validity of the search warrant.

Two recent decisions of the United States Supreme Court have greatly expanded the admissibility of evidence obtained through the use of an imperfect search warrant. In the case of *U.S. v. Leon*, 52 U.S.L.W. 5155 (U.S. July 5, 1984), the Court held that the exclusionary rule does not bar use in the prosecution's case in chief of evidence obtained by a law enforcement officer acting in objectively reasonable reliance on a search warrant that was issued by a detached and neutral magistrate, but was ultimately found to be unsupported by probable cause. On the same day in the case of *Massachusetts v. Sheppard*, 52 U.S.L.W. 5177 (U.S. July 5, 1984), the Supreme Court held the Fourth Amendment exclusionary rule did not require exclusion of evidence seized by the police pursuant to a warrant subsequently invalidated because of technical errors on the part of the issuing judge. Although these two recent cases are factually distinguishable from the case under review, they are further authority for the need to oppose invalidating search warrants because of minor technicalities. This assignment of error is overruled.

[2] Defendant's second assignment of error arises under the same statute dealing with the suppression of evidence, but for practical purposes his assignment deals more appropriately with discovery. Defendant contends the trial judge erred in denying his motion seeking to learn the identity of the confidential informant. G.S. 15A-978(b) provides as follows:

In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested, and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:

(1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or

(2) There is corroboration of the informant's existence independent of the testimony in question.

State v. Walker

The provisions of subdivisions (b)(1) and (b)(2) do not apply to situations in which disclosure of an informant's identity is required by controlling constitutional decisions.

Defendant asserts he is entitled to disclosure under *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957). The Supreme Court in that case stated that

[n]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relative factors.

Id. at 62, 77 S.Ct. at 628-29, 1 L.Ed. 2d at 646.

Defendant argues that disclosure of the informant's identity would be both relevant and helpful to defendant's case; that a contradiction exists in information furnished by affiant to the officer and testimony offered at the suppression hearing. Defendant's arguments miss the mark. He freely admitted to possession of marijuana and cocaine and pleaded guilty to the crime charged. His evidentiary and argumentative assertions were simply that the informant on whose information the warrant was issued had lied, had not been in defendant's residence, and had not seen any drugs there. The issue here concerns probable cause for an arrest and search with a warrant, not guilt or innocence. See *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975); see also *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed. 2d 62, *reh'g denied*, 386 U.S. 1042, 87 S.Ct. 1474, 18 L.Ed. 2d 616 (1967).

Finally, defendant proposes an in camera hearing could be granted to determine the need for disclosure. That is not a matter for this court, but must be addressed to the sound judgment of the Legislature or the Supreme Court for exercise under their rule making powers.

The judgment of the trial court is affirmed on all assignments of error.

Henderson v. Manpower

Affirmed.

Judges BRASWELL and EAGLES concur.

Judge EAGLES concurring.

I concur in the result but would not have reached the issue of the denial of defendant's motion to compel discovery of the identity of a confidential informant.

This case involves a guilty plea by defendant. The right to appeal after a guilty plea is defined by G.S. 15A-979(b) and is carefully limited to review of "an order finally denying a motion to suppress evidence. . . ." In light of our disposition on appeal of this motion to suppress, defendant's guilty plea has rendered moot the issue of the identity of the confidential informant. Because of his guilty plea, defendant's appeal in this case should be limited to the denial of his motion to suppress.

ROBERT L. HENDERSON, PLAINTIFF-EMPLOYEE v. MANPOWER OF GUILFORD COUNTY, INC., AND/OR BENNER & FIELDS, INC., DEFENDANT-EMPLOYERS AND THE HOME INDEMNITY COMPANY AND/OR MICHIGAN MUTUAL INSURANCE COMPANY, DEFENDANT-INSURANCE CARRIERS

No. 8310IC941

(Filed 18 September 1984)

Master and Servant § 53— workers' compensation—dual employment

Defendant construction company was a special employer of plaintiff and was therefore liable equally with defendant supplier of temporary workers for compensating plaintiff for an injury arising out of and in the course of his employment where the evidence tended to show that cutting trees and clearing lands, the work that injured plaintiff, was entirely the work of defendant construction company; in doing that work, plaintiff was under the sole control and supervision of the construction company which not only controlled the details of that work, but also had the right to discharge plaintiff from that work at will; defendant supplier had no control over plaintiff while he was working for the construction company, nor did it have any interest in controlling him during such time, since its business was hiring employees to others for their use; and the only control defendant supplier had over plaintiff was the power to assign him to an employer interested in renting his services, to establish his rate of pay on each job, and to terminate his connection with it when it saw fit.

Henderson v. Manpower

APPEAL by defendants Manpower of Guilford County, Inc. and The Home Indemnity Company from Opinion and Award of the North Carolina Industrial Commission entered 15 June 1983. Heard in the Court of Appeals 5 June 1984.

At the time involved in this case: Plaintiff, who was off from his regular job, was looking for temporary work; Benner & Fields, a construction company, was clearing land preliminary to constructing a building on it and needed workers to do the clearing; Manpower of Guilford County, Inc. was in the business of supplying temporary workers to many kinds of employers that needed them. For each temporary worker that Manpower supplies an employer it charges the employer an hourly rate depending upon the skills required for the job involved, establishes a lesser wage for the worker when his application is accepted, and when the job or week is over pays the employee direct, after withholding the taxes required by law. Upon inquiring at Manpower's office on 16 March 1981, plaintiff was told that a job clearing a construction site of trees was available, which he agreed to accept. His rate of pay was set at \$4.00 an hour, but the hourly rate that Benner & Fields paid Manpower for this job was \$6.25. Plaintiff filled out an employment application with Manpower, was told to report to J. C. Hunt, Benner & Fields' supervisor at the job site involved, and was given a slip of paper with the job site address and Hunt's name on it. Upon arriving at the job site plaintiff was put to work cutting down trees, and before the day was over a tree felled by a fellow employee struck and injured him. Benner & Fields paid Manpower \$6.25 an hour for the hours that plaintiff worked that day and Manpower in turn paid plaintiff \$4.00 an hour, less the withholding taxes.

When plaintiff's Workers' Compensation claim against both Manpower and Benner & Fields was heard, Deputy Commissioner Bryant concluded that when injured plaintiff was not an employee of Benner & Fields, but was an employee of Manpower, and awarded him disability benefits. Meanwhile, with the Commission's approval, plaintiff and Manpower's carrier entered into a lump sum settlement, which has been paid, and plaintiff is no longer interested in the case. Manpower appealed the determination that plaintiff was not also an employee of Benner & Fields; but the Full Commission affirmed the award in all respects, and Manpower again appealed.

Henderson v. Manpower

No brief filed for plaintiff appellee.

Tuggle, Duggins, Meschan & Elrod, by J. Reed Johnston, Jr., for defendant appellants Manpower of Guilford County, Inc. and The Home Insurance Company.

Shope, McNeil and Maddox, by E. Thomas Maddox, Jr., for defendant appellees Benner & Fields, Inc. and Michigan Mutual Insurance Company.

PHILLIPS, Judge.

The only question presented is whether plaintiff was employed solely by Manpower, as determined by the Industrial Commission, or was employed jointly by Manpower and Benner & Fields, as the appellants contend. We hold that plaintiff was employed both by Manpower and Benner & Fields and that both are therefore liable for the Workers' Compensation payments received by plaintiff. *Leggette v. McCotter*, 265 N.C. 617, 144 S.E. 2d 849 (1965).

The Commission's conclusion that plaintiff was not an employee of Benner & Fields was primarily based on the following finding of fact:

6. Although defendant-Manpower furnished no tools or materials, only Manpower could fire or hire the employees which they send to their customers. Because defendant-Manpower exercised ultimate control over the employees they sent to defendant-Benner & Fields, defendant-Manpower is singly liable for the injuries suffered by plaintiff in the course of his employment with Manpower.

Not only is this finding of fact not supported by competent evidence, but the evidence before the Commission indisputably established otherwise.

William Chambers, Manpower's Industrial Manager, testified that:

Manpower furnished no materials or tools at all for Mr. Henderson in connection with his work with Benner & Fields. Mr. Hunt had control over the manner and methods in which a particular job is done for a customer. When we get an order we are also told who the supervisor is that the men

Henderson v. Manpower

will be working for and the supervisor they are to report to. Once they get on the job they are under his supervisor [sic] one hundred percent. We furnish no supervision on jobs. This is customary and usual for Manpower. On this particular job on March 16, 1981 we were furnishing no supervision whatsoever to Mr. Henderson with respect to this particular job, nor did we furnish any tools or any materials.

. . . .

Benner & Fields was not obligated to continue to use the services of Mr. Henderson for any period of time. Mr. Henderson was subject to discharge from working for Benner & Fields at the discretion of Benner & Fields. When a person such as Mr. Henderson came and applied for temporary help with Manpower, Manpower did not guarantee that he would be furnished with a job. Mr. Henderson was not paid any wages until he was assigned a job for a customer of Manpower.

* * *

When we send an employee out to work for a customer that employee works for the customer only as long as the customer needs him. It is the customer's needs that we are furnishing. In Mr. Henderson's case if after working for Benner & Fields for a short time they told they didn't think he could handle the job and they didn't believe they could use him for the rest of the day and he left Benner & Fields, he would still be employed by Manpower. As to whether only Manpower has the power to fire and hire the people that we send out to customers, that is true.

* * *

It was Benner & Fields' supervisor's responsibility to assign particular duties to Mr. Henderson for this job. The supervisor had supervision over the manner and method in which Mr. Henderson carried out his duties. Manpower did not benefit in any way from the activity or services that Mr. Henderson was carrying out on the job site at Benner & Fields other than the \$6.25 an hour that was paid.

Irvin Angel, Benner & Fields' President, testified:

Henderson v. Manpower

As to whether Benner & Fields would direct the method and manner in which Mr. Henderson performed the duties that he was doing, we would direct the work to be done. The manner in which he does would be his own skills. If the manner in which it was done was not satisfactory we couldn't keep him on the job. The manner and method in which Mr. Henderson, Mr. Carter and any other person that was sent over by Manpower did his work was under the supervision of Mr. Hunt. As to whether in Mr. Henderson's case if we were not satisfied with the manner in which he was doing the work or his ability to take directions, we would not keep him if he was unsatisfactory, because Manpower's responsibility was to furnish those people skilled. Benner & Fields was not obligated to keep any person on the job site sent over by Manpower if he was not satisfactory. By him being not satisfactory, that is a decision Benner & Fields would make.

* * *

If we were dissatisfied with one of Manpower's employees, we would call Manpower and tell them that he was not performing his duties satisfactorily and he would likely be replaced. As to whether Manpower or us would replace him, Manpower.

No evidence to the contrary was offered. In our judgment, the evidence presented establishes as a matter of law that plaintiff was the employee of both Manpower and Benner & Fields within the contemplation of the Workers' Compensation Act. It shows that: Cutting trees and clearing land, the work that injured plaintiff, was entirely the work of Benner & Fields. In doing that work, plaintiff was under the sole control and supervision of Benner & Fields, who not only controlled the details of that work, but had the right to discharge plaintiff from *that* work at will. Manpower had no control whatever over plaintiff while he was working for Benner & Fields, nor did it have any interest in controlling him during such time, since its business is hiring employees to others for their use, and it had hired plaintiff to Benner & Fields for them to use as they saw fit. The control that Manpower had over plaintiff was the power to assign him to an employer interested in renting his services, to establish his rate of pay on each job, and terminate his connection with Manpower when it saw fit.

Henderson v. Manpower

That Benner & Fields had no power to terminate plaintiff's employment or arrangement with Manpower, which the Commission deemed decisive, is irrelevant to the case, in our opinion. The control that is relevant to the case was control over the tree cutting work and those that did it. If the Commission's conception to the contrary was legally correct, the loaned or borrowed servant rule would be unknown to the law, since a borrower, from the nature of things, has only the power to terminate the loan and after terminating it has no control whatever over that which had been borrowed and returned. Yet, the courts have long recognized that a general employee of one can also be the special employee of another while doing the latter's work and under his control. 99 C.J.S. *Workmen's Compensation* § 47 (1958). And it goes without saying that if a loaned servant is the borrower's servant also when doing the borrower's work and under his control, a servant especially hired out for that very purpose is likewise. *Leggette v. McCotter*, 265 N.C. 617, 144 S.E. 2d 849 (1965). In that case, a front-end loader operator, who was in the general employment of a building supplies concern that occasionally rented heavy equipment and the operator to its customers, was held to also be the special employee of the building contractor, who rented both the machine and operator, directed the details of the work, and had the power to terminate the special work being done, but had no power to terminate the general overall employment of the operator.

G.S. 97-2(2) defines an employee as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written. . . ." Nevertheless, it is fundamental that under some circumstances a person can be an employee of two different employers at the same time, in which event either employer or both may be liable for Workers' Compensation. *Leggette v. McCotter, supra*. The concept of joint employment in Workers' Compensation cases is explained in 1C, Larson, *Workmen's Compensation Law*, § 48.40 (1982) as follows:

Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the

Henderson v. Manpower

same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.

In § 48.00 of the same volume, the test for determining the liability of special employers in loaned employee cases is stated as follows:

When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if

- (a) the employee has made a contract of hire, express or implied, with the special employer;
- (b) the work being done is essentially that of the special employer; and
- (c) the special employer has a right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

The test stated was adopted by this Court in *Collins v. James Paul Edwards, Inc.*, 21 N.C. App. 455, 204 S.E. 2d 873, cert. denied, 285 N.C. 589, 206 S.E. 2d 862 (1974), and its three conditions are fully met by the facts of this case: (a) Although no express contract existed between plaintiff and Benner & Fields, an implied contract manifestly did, since they accepted plaintiff's work and were obligated to pay Manpower for it, and Manpower was obligated in turn to pay plaintiff; (b) plaintiff was doing Benner & Fields' work when injured; and (c) Benner & Fields had the right to and did control the details of that work.

Benner & Fields' contention that *Collins v. James Paul Edwards, Inc.*, *supra*, requires a holding that it was not a special employer of plaintiff is mistaken. In that case the general employer was a grading contractor, the alleged special employer was a paving contractor, neither was engaged in the business of furnishing employees to the other or anyone else, the employee never left the control of the general employer, and it did not appear to the court's satisfaction that the employee had consented to the control of the paving contractor. The circumstances of this case, already stated, are materially different. Furthermore, since

Boyles v. Boyles

the dominant purpose of the Workers' Compensation Act is to protect and compensate employees injured on their jobs, employers in charge of jobs where work is actually done and injuries occur should not be absolved of liability because of bookkeeping practices of those who merely arrange for workers to report to others.

In conclusion, we hold that Benner & Fields was a special employer of plaintiff and is therefore liable equally with Manpower for compensating the plaintiff.

The award of the Industrial Commission is vacated and the matter remanded for the entry of an award in favor of the appellants in accord with this opinion.

Vacated and remanded.

Judges WEBB and JOHNSON concur.

ALMA CHRISTINE BOYLES v. PAUL W. BOYLES

No. 8310SC1089

(Filed 18 September 1984)

1. Divorce and Alimony § 21— waiver of alimony—instruction properly refused

The trial court did not err in refusing to instruct upon and to submit to the jury the issue of plaintiff's waiver of alimony, nor did the court err in instructing the jury that there was insufficient evidence of waiver to justify such a finding.

2. Divorce and Alimony § 24.10— change in age of majority—father's obligation to support until age 21

Defendant was not relieved of his obligation to pay child support until his children reached 21 because the age of majority changed from 21 to 18 years under the laws of the state where the children were domiciled, since the parties' divorce decree was a closed support order; it defined a definite termination date; and under Florida law the husband remained bound to pay child support until each child reached 21 because the statute lowering the age of majority to 18 years operated prospectively, not retrospectively, and did not affect pre-existing rights.

Boyles v. Boyles

3. Divorce and Alimony § 24.1— room and board for college students—orthodontic expense—father's support obligation

Defendant was not entitled to a credit for payment of room and board expenses for his children while they were in college, since, pursuant to the parties' separation agreement incorporated into the divorce decree, defendant was required to pay the tuition and other expenses incidental to a college education for each of the children so long as they made passing grades; moreover, orthodontic care for one of the children was a legitimate dental expense which defendant was required to pay.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 1 June 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 22 August 1984.

In this civil action, Alma Christine Boyles, as plaintiff, seeks relief from defendant for (1) alimony arrearages from October 1962 through April 1981; (2) unpaid medical and dental bills for the parties' children; and (3) unpaid child support. From judgment entered on the verdict awarding plaintiff \$24,000 for unpaid alimony, \$1,850 for orthodonture for one child, and nothing for child support, defendant appeals.

Paul W. Boyles and Alma Christine Boyles were divorced on 19 October 1962 by the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida. The final decree of divorce which incorporated a separation agreement required that Paul Boyles pay Alma Boyles the sum of \$200 per month in alimony so long as Alma Boyles remained unmarried, \$400 per month for support and maintenance of the minor children until each child reached the age of 21 years, and all medical and dental expenses along with tuition and incidental expenses for a college education.

In 1965 plaintiff filed a Uniform Reciprocal Support Act petition against the defendant in Pennsylvania seeking an increase in child support. The monthly payment was increased to \$500. In 1968 another order in the Pennsylvania court increased the monthly child support obligations to \$600. Defendant ceased paying alimony around April 1966.

The jury award of alimony in the sum of \$24,000 covered a ten-year period prior to verdict, the remaining claim being barred by the statute of limitations. The orthodonture award of \$1,850 covered treatment for one child.

Boyles v. Boyles

DeBank, McDaniel, Heidgerd, Holbrook and Anderson, by Douglas F. DeBank for plaintiff appellee.

Sanford, Adams, McCullough and Beard, by Charles H. Montgomery and Nancy H. Hemphill for defendant appellant.

HILL, Judge.

Defendant Paul W. Boyles brings forth six assignments of error concerning instructions to the jury, rulings on motions for directed verdicts, and rulings on testimonial objections. We have examined each of the assignments and find no basis for reversal.

[1] Defendant first contends that because defendant pled and presented evidence by which he attempted to show that plaintiff had waived her right to alimony, the trial judge committed error in refusing to instruct upon and to submit to the jury the issue of plaintiff's waiver of alimony. Instead the trial judge instructed the jury there was insufficient evidence of waiver to justify such a finding. Defendant further contends that in so instructing the jury the judge expressed an opinion as to the facts which unfairly prejudiced the defendant. Defendant bases his contentions of waiver on two sets of circumstances.

First, defendant claims plaintiff waived alimony on the process of a 1965 reciprocal support action filed in Pennsylvania through an agreement to relinquish her claims for alimony in consideration of child support being raised to \$500 per month. Defendant also contends that plaintiff's delay of fourteen years in moving to enforce a default judgment was further evidence of waiver. See *Colonial Penn Communities, Inc. v. Crosley*, 443 So. 2d 1030 (Fla. 5th DCA 1983). The evidence is not supportive of plaintiff's waiver. On the contrary, the evidence indicates that plaintiff never waived her right to alimony either by agreement or by delay. Defendant said he tried to work out an agreement through the district attorney's office in Pennsylvania, and the district attorney said that plaintiff agreed. Defendant received a letter from the district attorney's office, but as far as he knew there was no court order stipulating to that effect. Indeed, the order increasing the award of child support is totally silent of any waiver of alimony by the wife, nor does the record reveal any agreement constituting a waiver of alimony by plaintiff. Evidence tends to show that the increase in child support to \$500 per

Boyles v. Boyles

month was due to plaintiff's agreement that defendant have the children for six weeks visitation during the summer. Also, in April of 1971, plaintiff secured by way of a motion in the cause in the Florida divorce proceeding, a default judgment against defendant for unpaid alimony arrearages through April 1971. *Boyles v. Boyles*, 308 N.C. 488, 302 S.E. 2d 790 (1983).

Second, defendant contends plaintiff lost her rights to alimony due to his belief that she was cohabitating with another man. Defendant testified that in April 1966 he unexpectedly called at his wife's home in Florida. The door was opened by a man wearing underwear, who told the defendant that he owned the property and was the new father. Claiming the plaintiff had remarried, defendant stopped paying alimony. This evidence was rebutted by the wife and children who stated that the man was a friend of the family and never spent the night at their home when the mother was present. The wife further testified that she had not remarried since her divorce from defendant.

The trial judge in his charge to the jury set out defendant's contentions concerning the purported waiver of claim for alimony and the defendant's refusal to pay because of his purported belief that his wife had remarried, and thereafter advised the jury there was insufficient evidence to justify a finding of waiver or that plaintiff was married. We believe the trial judge was correct in refusing to instruct upon and submit to the jury the issue of plaintiff's alleged waiver of alimony. As stated by Justice Rodman in *Chisholm v. Hall*, 255 N.C. 374, 376, 121 S.E. 2d 726, 728 (1961):

When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner.

We believe the trial judge properly gave the peremptory instruction to the jury on the alimony issue and did not express any opinion on the facts of the case.

[2] Defendant next contends that his obligation to pay child support under the separation agreement ceased as each child reached eighteen years of age because the age of majority changed from twenty-one to eighteen years in 1973 under Florida law. See Fla.

Boyles v. Boyles

Stat. § 1.01(14). Florida is the place of domicile of the children and the law of Florida controls. *Clingan v. Duffey*, 381 So. 2d 303 (Fla. 2d DCA 1980). The trial judge permitted the defendant to show overpayment totalling \$3,460 for several months during which certain of the children had become twenty-one and defendant had continued to make the \$400 payment thereafter. However, the trial judge denied defendant the right to exclude sums paid for each child upon attaining the age of eighteen years which defendant assigns as error.

The final decree of divorce provided that

[a]s each child reaches the age of twenty-one years, marries or becomes independent, the child support for that particular child shall cease and the sum of \$400.00 shall be decreased proportionately in accordance with the number of children remaining.

This order is a closed support order; it defines a definite termination date, and under Florida law the husband remains bound to pay child support until each child reaches his twenty-first birthday, because the statute which lowers the age of majority to eighteen years operates prospectively, not retrospectively, and does not affect pre-existing rights. *Field v. Field*, 291 So. 2d 654 (Fla. 2d DCA 1974). Thus, the trial judge correctly denied defendant the right to exclude sums paid for each child upon reaching the age of eighteen years. The trial judge also correctly allowed the \$3,460 to be considered as a setoff against the \$3,700 claimed by the plaintiff for delinquent child support, and the jury awarded plaintiff nothing on the child support issue.

[3] Defendant next contends the trial court erred in refusing to allow defendant to testify about the amount of money he paid for his children's college expenses. At trial he offered to show that in addition to paying his children's tuition, fees, books and other incidental educational expenses, he paid over \$24,000 for their college room and board. During most of this time he was also paying \$600 per month child support to plaintiff. He contends payment of room and board expenses was in excess of that provided for in the agreement, and that he was entitled to credit for those amounts. See *Mooty v. Mooty*, 179 So. 155 (Fla. 1938). We find no merit to this assignment of error. Under the separation agreement incorporated into the divorce decree, the defendant was re-

Boyles v. Boyles

quired to pay the tuition and other expenses incidental to a college education for each of the children so long as they made passing grades. Room and board are expenses incidental, even necessary, to obtaining a college education.

Lastly, defendant contends the court erred in denying his motion for directed verdict and judgment notwithstanding the verdict on the issue of dental expenses. The separation agreement incorporated into the final judgment provided that defendant would pay "all medical and dental expenses of the minor children." The plaintiff presented competent evidence that one of the children suffered a severe maxillary protrusion, producing an overbite, that required orthodontic care. We conclude it to be a legitimate dental expense.

For the reasons set out herein we find no error by the judge in denying defendant's motion for directed verdict on the issue of defendant's overpayment of child support and entitlement to a set-off. And we find no error by the court in refusing to instruct the jury on the issue of defendant's right to a credit or setoff of defendant's alleged overpayment of child support against the plaintiff's claim for alimony. The suit for alimony inures to the benefit of the wife, while child support is for the child even though paid to the spouse for proper disbursement. There is a lack of mutuality in the rights to the monies. See *In re Bank*, 205 N.C. 333, 171 S.E. 436 (1933).

For the reasons stated, the decision of the trial judge is

Affirmed.

Judges BECTON and BRASWELL concur.

State v. McGinnis

STATE OF NORTH CAROLINA v. TERRY LYNN MCGINNIS

No. 8326SC1004

(Filed 18 September 1984)

1. Constitutional Law § 76; Criminal Law § 48— post-arrest silence—impeachment evidence—due process not violated—right to remain silent not violated

Where the evidence failed to show that defendant was given the Miranda warnings upon arrest, his Fourteenth Amendment due process rights were not violated by the State's attempt to impeach him with evidence of his post-arrest silence; nor was defendant's Fifth Amendment right to remain silent violated, since the right of a defendant, who chooses to testify in his own behalf, to remain silent must give way to the State's right to seek to determine, by way of impeachment, whether a defendant's prior silence is inconsistent with the trial testimony.

2. Criminal Law § 46.1— flight of defendant—effect on defendant's credibility

The trial court did not err in instructing the jury that defendant's flight could be considered in determining defendant's credibility.

3. Assault and Battery § 15.7— self-defense—instruction not required

In a prosecution for assault with a deadly weapon inflicting serious injury, defendant was not entitled to an instruction on self-defense where the evidence failed to show any real or apparent threat of death or great bodily harm to defendant.

APPEAL by defendant from *Friday, John R., Judge*. Judgment entered 17 December 1982 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 27 August 1984.

Defendant was convicted of assault with a deadly weapon, inflicting serious injury in connection with the 27 May 1982 shooting of an acquaintance, John Robinson, outside a bar in Mecklenburg County.

At trial, defendant's evidence tended to show the following events and circumstances surrounding the shooting. In 1975, a car driven by Robinson and occupied by defendant and defendant's best friend, Gary Baron, was involved in a serious accident. Baron was killed, and defendant was crippled. Robinson was also injured but eventually recovered. After the accident, the relationship between Robinson and defendant deteriorated. On two occasions, Robinson choked or hit defendant and defendant filed a civil suit against Robinson for damages resulting from the car wreck.

State v. McGinnis

On the evening of 27 May 1982, defendant, his girl friend, and a male companion drove to a bar in Mecklenburg County. Defendant remained in the car while his companions entered the bar. Robinson, who had been inside the bar, came out to the parking lot, where he struck up a conversation with defendant. The two became involved in an argument about Gary Baron and Robinson then walked toward his own car. Defendant, afraid that Robinson might become violent, removed a gun from his car console and waited to see what Robinson would do. As Robinson reached inside his car and started back toward defendant's car, defendant became more apprehensive and placed his gun in his mouth, ready to fire if necessary. Robinson took a few more steps and the gun then discharged accidentally, striking Robinson in the abdomen.

Evidence for the state tended to show that no angry words were exchanged between Robinson and defendant on the night of the shooting. The two chatted briefly, and Robinson was walking toward his car, when he heard someone call his name. Robinson turned around, saw defendant pointing a gun at him, and stood still until he was shot. After the shooting, Robinson ran a little way and asked defendant why he had shot him. Defendant's companions then returned and all three quickly left the scene in defendant's car. Defendant was arrested a short time later at a business owned by a relative. The record does not disclose whether defendant was ever advised of his *Miranda* rights. Defendant made no statements to police following his arrest.

At trial, defendant testified on his own behalf, and contended that the shooting was an accident. On cross-examination, the state sought to impeach defendant with his failure to tell police at the time of his arrest that the shooting was accidental.

Following the trial, the jury found defendant guilty and defendant was sentenced to three years in jail. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Lucien Capone III, for the State.

Nora Henry Hargrove for defendant.

State v. McGinnis

WELLS, Judge.

[1] In his first assignment of error, defendant contends that his rights under the 5th and 14th amendments of the United States Constitution were violated by the state's attempt to impeach him with evidence of his post-arrest silence.

We first address defendant's 14th amendment due process argument. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court held that a defendant's silence at the time of arrest and after receiving *Miranda* warnings could not be used to impeach his testimony at trial. The *Miranda*¹ decision requires that a person taken into custody be advised, *inter alia*, that he has the right to remain silent. Implicit in this warning is the assurance that the exercise of the right to remain silent will carry no penalty. *Id.* It would be fundamentally unfair and thus a violation of the due process clause of the 14th amendment for the state to "induce" a defendant's silence by means of the *Miranda* warnings, then use defendant's silence in an attempt to impeach his trial testimony. *Id.*

Where a defendant is arrested, but police fail to give the *Miranda* warnings, the United States Supreme Court applies a different rule. In *Fletcher v. Weir*, 455 U.S. 603 (1982), the Court noted that it had "consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." In *Fletcher v. Weir*, *supra*, however, the evidence failed to show that defendant was given the *Miranda* warnings upon arrest. The Court held that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.*

Defendant's 14th amendment due process argument thus rests upon proof that police gave him the *Miranda* warnings at the time of arrest, thereby assuring him that his silence would not be used against him. The burden of demonstrating error rests

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

State v. McGinnis

upon the appealing party.² In the case before us, defendant has failed to show that he was given *Miranda* warnings and therefore he has not met his burden of proving a denial of due process under the 14th amendment.

We next consider defendant's 5th amendment argument. In *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980) (citing *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974), our supreme court took the position that with or without a *Miranda* warning, a defendant's right to remain silent is guaranteed by the 5th amendment, as well as by article I, section 23 of the North Carolina Constitution, and that any comment upon the exercise of this right, nothing else appearing, was impermissible. When a defendant chooses to testify in his own behalf, as did defendant in this case, his 5th amendment right to remain silent must give way to the state's right to seek to determine, by way of impeachment, whether a defendant's prior silence is inconsistent with his trial testimony. *Id.* The test is whether, under the circumstances at the time of arrest, it would have been natural for defendant to have asserted the same defense asserted at trial. *Id.* We hold that in this case, it would clearly have been natural for defendant to have told the arresting police officer that the shooting with which defendant was accused was accidental, if defendant believed that to be the case. This assignment is overruled.

[2] Under another assignment of error, defendant contends that the trial court erred in instructing the jury that defendant's flight could be considered in determining defendant's credibility. Defendant does not argue that there was not evidence of flight, only that such evidence did not go to defendant's credibility. The trial court, in pertinent part, instructed the jury as follows:

Now, Members of the Jury, the Court instructs you that the voluntary flight of the defendant immediately after the alleged crime has been committed is not a circumstance sufficient in itself to establish his guilt, but it is a circumstance, which, if proven by the State beyond a reasonable doubt, you may consider in the light of all the other evidence in this case in determining the credibility or the defendant's guilt or in-

2. See *Weir v. Fletcher*, 680 F. 2d 437 (6th Cir. 1982) (burden on defendant), but see, *U.S. v. Cumiskey*, 728 F. 2d 200 (3d Cir. 1984) (burden on state).

State v. McGinnis

nocence. You, and you alone, just determine the significance of that evidence, if you find that there was flight, and if you find that beyond a reasonable doubt.

Defendant failed to object to this portion of the charge and, therefore, under Rule 10(b)(2) of the Rules of Appellate Procedure, defendant failed to preserve this question. Defendant contends, however, that the above quoted portion of the charge contains such "plain error" as to require reversal, relying on *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). If there was error in the charge, we hold that there was no "plain error" sufficient to invoke the rule in *State v. Odom, supra*. This assignment is overruled.

[3] Under another assignment of error, defendant contends that the trial court erred in refusing to give defendant's requested jury instruction on self-defense. At trial, defendant testified on direct examination as follows:

Q. Did you fire the gun?

A. Yes, sir.

Q. Why?

A. Because I thought my life might be threatened, but I didn't mean to fire it when I did fire it.

Q. How did the gun come to be fired?

A. I just put more pressure on it than I realized I was because I was tense and nervous.

Q. You were prepared to fire the gun, if necessary?

A. Yes, sir.

We hold that such evidence fails to show any real or apparent threat of death or great bodily harm to defendant. *State v. Dial*, 38 N.C. App. 529, 248 S.E. 2d 366 (1978), and did not entitle defendant to an instruction on self-defense. *State v. Dial, supra*. This assignment is overruled.

No error.

Chief Judge VAUGHN and Judge HEDRICK concur.

State v. Edmondson

STATE OF NORTH CAROLINA v. TERRIS LEE EDMONDSON

No. 838SC1076

(Filed 18 September 1984)

1. Burglary and Unlawful Breakings § 1; Larceny § 1— felonious breaking or entering and felonious larceny—separate offenses

The crimes of felonious breaking or entering and felonious larceny are clearly separate and distinct crimes, neither one a lesser included offense of the other, so that defendant could properly be convicted of both.

2. Criminal Law § 61.2— shoe prints—non-expert opinion evidence admissible

In a prosecution for felonious breaking or entering and felonious larceny, the trial court did not err in admitting opinion testimony by the investigating officers as to whether defendant's tennis shoes made the tracks present at the crime scene, since non-expert testimony about the similarities between shoes and shoe prints is admissible.

3. Property § 4.2— damage to property—determination of amount

The trial court did not err in denying defendant's motions to dismiss the charge of wilful and wanton damage to desks, drawers, and cabinets in excess of \$200, though there was no precise evidence as to the amount of the damages, since the jury, after hearing all the evidence and viewing photographs which showed extensive damage in the ransacked offices, could exercise their own reason, common sense, and knowledge acquired by their observation and experiences of everyday life to determine the amount of damages.

APPEAL by defendant from *Preston, Judge*. Judgment entered 14 April 1983 in Superior Court, LENOIR County. Heard in the Court of Appeals 21 August 1984.

In pertinent part, the State's evidence showed the following:

Defendant was apprehended in the warehouse of the Wickes Lumber Company during the early morning hours of 5 December 1982. Police officers responded to a burglar alarm and discovered a truck which had been crashed into the back wall of the company sales offices. The door had been forced open and the offices ransacked. In the adjoining warehouse, a forklift had been used to break open the double doors leading to the sales offices. A five gallon can of roofing compound had been run over by the forklift, spilling the compound on the floor. Tennis shoe tracks of the roofing compound went through the office.

State v. Edmondson

Defendant was apprehended in the warehouse, wearing white tennis shoes partially covered with the roofing compound. Over defense counsel's objection, the police officers present at the scene testified that in their opinion, defendant's shoes made the tracks left in the offices. A search of the warehouse revealed a coat and a glove. Defendant stated that the coat belonged to him. A gold pocketknife was found in the coat pocket. Jack Pope, manager of Wickes Lumber's retail store, testified that the knife was his ten-year service award.

Mr. Pope estimated damages to the building at \$3,881, including \$3,400 to repair the outside wall, \$385 to repair damage done by the forklift, and \$96 to clean the floors. Repairing the alarm system would cost at least \$280 and truck repairs totalled \$2,869.62.

The defendant testified that he had followed someone he thought he knew into the lumber yard. There he discovered the truck and the open door. He denied ransacking the offices, touching the forklift, or taking the knife. He admitted entering the building when the police arrived. He further testified that he knew one of the arresting officers from a previous incident.

The jury found defendant guilty of felonious breaking or entering, felonious larceny, unauthorized use of a motor vehicle, wilful and wanton damage to real property, and two counts of wilful and wanton damage to personal property in excess of \$200. The trial judge consolidated the charges for sentencing and imposed a sentence of ten years imprisonment.

Attorney General Rufus L. Edmisten, by Associate Attorney Michael T. Mills, for the State.

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Public Defender, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in allowing the jury to convict him of both felonious breaking or entering, N.C. Gen. Stat. § 14-54(a) (1981), and felonious larceny pursuant to a breaking or entering, N.C. Gen. Stat. § 14-72(b) (1981). Defendant reasons that felonious breaking or entering is a lesser-in-

State v. Edmondson

cluded offense of felonious larceny, and therefore that he cannot be convicted of and punished for both.

The test for determining whether one offense is a lesser-included offense of another so as to prevent conviction for both was set out by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304 (1932):

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

The use of the word "each" indicates that two crimes are separate and distinct only if *both* have a unique element or fact, one not shared with the other. If the elements of either crime are wholly contained in the other, then the two crimes are not distinct, and one is a lesser-included offense of the other.

In the case at bar, the proof of felonious larceny pursuant to a breaking or entering involves demonstrating that a larceny was committed pursuant to a violation of N.C. Gen. Stat. § 14-54. *See* N.C. Gen. Stat. § 14-72(b)(2) (1981). A violation of Section 14-54 thus would appear to be a statutorily-created element of the crime of felonious larceny, in addition to the common law elements of simple larceny.

Section 14-54 defines two crimes, felonious breaking or entering and misdemeanor breaking or entering. Under the plain language of the felonious larceny statute, the elements of *either* of these two crimes are also elements of felonious larceny. The State argues that an intent to commit a larceny or other felony, which is an element for felonious breaking or entering, is unnecessary as an element for felonious larceny. Therefore, the State argues, the felonious intent needed for felonious breaking or entering is an additional fact or element which makes it a crime separate and distinct from felonious larceny.

As noted above, the statute makes a violation of *either* felonious breaking or entering or misdemeanor breaking or entering an element of felonious larceny. At trial, the proof of intent to commit a larceny is generally not required for felonious larceny

State v. Edmondson

pursuant to breaking or entering, but that is because it is assumed that proof of the felony proves an intent to commit the felony. The element of intent is merely merged into the completed crime.

Moreover, it makes no difference that the crime of felonious larceny has an element which is not an element of felonious breaking or entering. For one crime to be a lesser-included offense of another it does not have to contain all the elements of the other. Indeed, if this were true, then the two would be the same crime, not lesser and greater crimes.

The defense analogy to the merging of the underlying felony into a felony-murder conviction is apt, particularly since the underlying felony is a statutorily-created element of the felony-murder. See *State v. Thompson*, 280 N.C. 202, 215-16, 185 S.E. 2d 666, 675 (1972); N.C. Gen. Stat. § 14-17 (1981).

Another useful analogy is the United States Supreme Court's interpretation of the Federal Bank Robbery Act, 18 U.S.C. § 2113. The Court has found the crime of entering a bank with an intent to commit a bank robbery to be a lesser-included offense of bank robbery. *Prince v. United States*, 352 U.S. 322, 77 S.Ct. 403 (1957). The Court found that the mental element of entering with intent to commit a robbery merged into the completed crime when the robbery was carried out. *Prince*, 352 U.S. at 328. Further, it found that by creating in statute what appear to be two separate crimes, Congress did not intend to "pyramid sentences," but to provide a means of convicting persons who entered a bank to commit a robbery but who were frustrated before completing the crime. *Prince*, 352 U.S. at 328.

Would the same analysis not apply to the statute before us? Does the mental element of felonious breaking or entering not merge into felonious larceny? Is the felonious breaking or entering statute but a means to punish those who do not complete the crime, rather than to produce unfair punishment when they do?

These arguments have been rejected on at least two prior occasions by this Court. *State v. Smith*, 66 N.C. App. 570, --- S.E. 2d --- (1984); *State v. Downing*, 66 N.C. App. 686, 688, --- S.E. 2d --- (1984). The crimes of felonious breaking or entering and felonious larceny have been held to be "clearly separate and

State v. Edmondson

distinct crimes, neither one a lesser included offense of the other." *State v. Smith, supra*, at 575. Although we feel there is considerable merit in the defendant's arguments, we feel compelled to follow our prior decisions and to hold that the defendant's conviction of both crimes was not error.

[2] Defendant contends that the trial court erred also in admitting, over defense counsel's objections, the non-expert opinion testimony given by the investigating officers as to whether defendant's tennis shoes made the tracks present at the crime scene. We find no merit in this contention. Non-expert testimony about the similarities between shoes and shoe prints is admissible. *State v. Jackson*, 302 N.C. 101, 107-09, 273 S.E. 2d 666, 671-72 (1981). The basis or circumstances behind a non-expert opinion affect only the weight of the evidence, not its admissibility. *Id.*; see also *State v. Plowden*, 65 N.C. App. 408, 410, 308 S.E. 2d 918, 919 (1983).

[3] Finally, defendant contends that the trial court erred in denying defendant's motions to dismiss the charge of wilful and wanton damage to the desks, drawers, and cabinets in excess of \$200. He argues that there was no evidence presented as to the amount of damage done to the personal property. We find no error.

After hearing all the evidence, and viewing photographs that showed extensive damage in the ransacked offices, the jury found that the damage done to the personal property exceeded \$200. While there may not have been any precise evidence as to the amount of these damages the jury was free to exercise their own reason, common sense and knowledge acquired by their observation and experiences of everyday life. 1 Brandis on North Carolina Evidence § 15 (2d rev. ed. 1982).

No error.

Judges WHICHARD and EAGLES concur.

Eastern Roofing and Aluminum Co. v. Brock

EASTERN ROOFING AND ALUMINUM COMPANY, A NORTH CAROLINA CORPORATION v. D. C. BROCK AND WIFE, EUNICE BROCK

No. 8310DC1120

(Filed 18 September 1984)

Unfair Competition § 1— door-to-door sales—right to cancellation—failure to give notice—unfair and deceptive act

Plaintiff's failure to explain orally to defendants their right to cancel a contract for home improvements at the time the agreement was signed, coupled with defective notice of cancellation which was incomplete and unattached to the contract in violation of G.S. 25A-40(b), constituted an unfair and deceptive act in violation of G.S. 75-1.1, and plaintiff's conduct was the proximate cause of defendants' injury for which they suffered a loss in the amount of \$500.

APPEAL by plaintiff from *Cashwell, Judge*. Judgment entered 25 May 1983 in District Court, WAKE County. Heard in the Court of Appeals 24 August 1984.

Plaintiff seeks damages from defendants under the terms of a contract for certain home improvements. The record contains no transcript, and we are limited in our scope of review. From the pleadings and a stipulation entered into by the parties the following facts appear:

The parties entered into a contract on 7 May 1981 providing the plaintiff was to install siding and windows on defendants' house. Defendants made a deposit on the contract of \$500.00, agreed to pay \$1,639.00 on 14 May 1981, and pay the balance of \$6,400.00 upon completion. The contract was reduced to writing and signed by the parties. In bold print above the signature of the parties appeared the following: "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right." Within apt time the defendants elected to cancel the contract, and finding the attached notice of cancellation missing, tried unsuccessfully to perfect the cancellation by telephone. No work was ever done on defendants' property.

Plaintiff refused to refund the \$500.00 deposit and sued for the amount of \$1,639.00 as the remainder due. Defendants' answer

Eastern Roofing and Aluminum Co. v. Brock

denied plaintiff's claim for relief and defendants' counterclaim demanded treble damages and attorney fees as provided in Chapter 75 of the North Carolina General Statutes.

At trial the parties stipulated the validity of the contract, the contract price, the \$500.00 deposit and the other terms of the contract price, together with cancellation provisions therein. Plaintiff moved for a directed verdict, which was denied. The following issues were submitted to the jury and answered as follows:

1. Did the Defendants, D. C. and Eunice Brock, validly cancel the contract with the Plaintiff, Eastern Roofing and Aluminum Company? If your answer is yes, skip Issues 2 and 3 and consider Issues 4, 5, and 6. If your answer is No, go on to consider Issue #2.

JURY'S ANSWER: Yes

4. Did the Plaintiff, at the time the contract was entered, fail to inform the Defendants orally of the Defendants right to cancel the contract? If your answer is yes, consider Issues 5 and 6. If your answer is no, then stop, for this is your verdict.

JURY'S ANSWER: Yes

5. Was the Plaintiffs conduct a proximate cause of the Defendants injury? If your answer is yes, consider issue 6. If your answer is No, then stop for this is your verdict.

JURY'S ANSWER: Yes

6. By what amount if any, have the Defendants been injured?

JURY'S ANSWER: \$500.00

The trial judge denied plaintiff's motion for judgment notwithstanding the verdict and thereafter made the following conclusions of law:

1. Defendants are entitled to recover FIVE HUNDRED (\$500.00) DOLLARS from the Plaintiff as return of their deposit for having validly cancelled the contract with the Plaintiff.

Eastern Roofing and Aluminum Co. v. Brock

2. Plaintiff's failure to inform the Defendants orally of their rights to cancel the contract at the time the parties entered into the contract was a violation of the North Carolina General Statute § 75-1.1 for which the Defendants suffered damages of FIVE HUNDRED (\$500.00) DOLLARS.

3. The Defendants are entitled to a treble award of the damages suffered or ONE THOUSAND FIVE HUNDRED (\$1,500.00) DOLLARS as provided in North Carolina General Statute § 75-16.

4. Defendants, having failed to show malicious or fraudulent intent on the part of the Plaintiff, are not entitled to an award of attorney's fees as provided in North Carolina General Statute § 75-16.1.

The trial judge entered judgment against plaintiff for \$2,000.00 together with the costs and denied defendants' prayer for attorney fees. Plaintiff appeals.

Robert A. Hassell, for plaintiff appellant.

Samuel J. Morris, III, for defendant appellees.

HILL, Judge.

Plaintiff contends that defendants failed to notify plaintiff in writing of their intention to cancel the contract as required by G.S. 25A-39 and G.S. 25A-40, and therefore, defendants did not validly cancel their contract with the plaintiff.

Because the language of G.S. 75-1.1 closely resembles that employed by Section 5(a)(1) of the Federal Trade Commission Act, codified at 15 U.S.C. § 45(a)(1) (1976), the North Carolina Supreme Court has established by earlier decisions that federal decisions interpreting the FTC Act may be used as guidance in construing the scope and meaning of G.S. 75-1.1. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981); *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980); *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Federal law is specifically cited in G.S. 25A-39(a) by referring to the "Federal Trade Commission Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales." The pertinent provisions of this trade regulation rule to the case under review recite that

Eastern Roofing and Aluminum Co. v. Brock

[i]n connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

...

(b) Fail to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable. . . .

...

(e) Fail to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

16 C.F.R. § 429.1 (1984).

Defendants contend that plaintiff's failure to comply with 16 C.F.R. § 429.1(e), by in fact failing to orally explain to defendants their rights to cancel at the time the agreement was signed, coupled with the defective notice of cancellation which was incomplete and unattached to the contract in violation of G.S. 25A-40(b) and 16 C.F.R. § 429.1(b), constitute an unfair and deceptive act in violation of G.S. 75-1.1. We agree. Plaintiff's non-compliance with 16 C.F.R. § 429.1(b) and (e) and G.S. 25A-40(b) was directly responsible for defendants' failure to give written notice of cancellation which requirement was not contained in the contract except in the notice of cancellation. Without knowledge of the requirement for written notice, defendants in good faith complied with what they understood to be the required notice of cancellation contained in the contract, i.e., cancellation within three business days from the date of the transaction. It is significant that the language contained in the unsigned acknowledgment in the notice of cancellation specifically indicates that the buyers received oral representations of their right to cancel, clearly an effort designed to comply with 16 C.F.R. § 429(e).

The jury found as fact that plaintiff, at the time the contract was entered, failed to inform defendants orally of defendants' right to cancel, and that plaintiff's conduct was the proximate cause of defendants' injury for which defendants suffered a loss in the amount of \$500.00. Based on these findings of fact the trial

Broadway v. Blythe Industries, Inc.

court concluded as a matter of law that plaintiff violated G.S. 75-1.1. In addressing defendants' claim of plaintiff's violation of G.S. 75-1.1, the trial court properly instructed the jury to find the facts, and based on the jury's finding, the court determined as a matter of law whether the plaintiff engaged in "unfair or deceptive acts or practices in the conduct of trade or commerce." *Hardy v. Toler*, 288 N.C. 303, 310, 218 S.E. 2d 342, 347 (1975).

The trial court was correct in finding that plaintiff did violate G.S. 75-1.1 based on the jury verdict and therefore trebled the damages. However, the award by the jury in the sum of \$500.00 should have been trebled to \$1,500.00, and this sum, not \$2,000.00, should have been the total amount awarded defendants. For this reason the judgment of the trial court is stricken, and the case remanded to the trial court for entry of judgment in conformity herewith.

Remanded.

Judges BRASWELL and PHILLIPS concur.

JAMES A. BROADWAY, ADMINISTRATOR OF THE ESTATE OF PHILLIP THOMPSON
v. BLYTHE INDUSTRIES, INC., RELIANCE UNIVERSAL, INC. OF OHIO,
D/B/A CAROLINA CONCRETE PIPE COMPANY, THE CITY OF CHAR-
LOTTE, NORTH CAROLINA AND HOWARD LISK, INC.

No. 8326SC1099

(Filed 18 September 1984)

Negligence §§ 30.2, 36— child crushed by pipes—no negligence by carrier of pipes—intervening negligence

In an action to recover for the death of plaintiff's intestate, a minor child killed at a construction site when large concrete pipes rolled over and crushed him 11 days after they were delivered, the trial court properly entered summary judgment for defendant carrier of the pipes where the materials before the trial judge showed that defendant safely transported and delivered the pipes to the work site; defendant safely unloaded the pipes at the place directed by the foreman for the company which had contracted to install them; the installer's foreman accepted the pipes, delivered in good condition; defendant's duty ended at that point and defendant was not responsible for chocking the pipes to prevent them from rolling once unloaded; and the installer's alleged intervening negligence over the 11-day period insulated, as a matter of

Broadway v. Blythe Industries, Inc.

law, any alleged negligence of the carrier because it broke all causal connections between the conduct of the carrier's driver and the ultimate injury.

Judge WELLS dissenting.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 6 July 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 August 1984.

Plaintiff, administrator of the estate, appeals from an order granting defendant Howard Lisk, Inc. summary judgment on the question of its liability for the death of plaintiff's intestate, a minor child killed at a construction site when large concrete pipes rolled over and crushed him. None of the other defendants named in the caption are parties to this appeal.

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., by James E. Ferguson, II, for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by Henry C. Byrum, Jr. and Frederick C. Meekins; and Henry T. Drake, for defendant appellee.

VAUGHN, Chief Judge.

The uncontradicted forecast of evidence before the judge was as follows: Lisk is a contract carrier holding a certificate from the North Carolina Utilities Commission which permits it to, among other things, transport concrete pipe for Carolina Concrete Pipe Company, hereinafter (Carolina). On 30 December 1982, defendant's driver, McCraven, picked up a load of concrete pipe from Carolina and transported it to property owned by the City of Charlotte at a job site where Blythe Industries, Inc., hereinafter (Blythe), had contracted to install them for the City. McCraven was met at the job site by Blythe's foreman, Bowman, and one or more other employees of Blythe. The foreman instructed McCraven as to where the load was to be placed. The Lisk vehicle was equipped with a set of hydraulic forks on the rear of the trailer. The pipes were rolled to the rear of the trailer where the hydraulic lift caught each pipe and placed it flat on the ground. The pipes were not stacked but were placed one behind the other. McCraven, the driver, operated the hydraulic lift with controls located outside of the cab of the truck. Blythe's foreman, Bow-

Broadway v. Blythe Industries, Inc.

man, and another Blythe employee were on the ground. There was a slight incline where McCraven was directed to place the pipes. After the pipes were unloaded, Bowman signed the shipping invoice and McCraven left the job site.

Eleven days later on 10 January 1982 plaintiff's intestate was playing on the pipes, and was killed, when one of them rolled over him.

In addition to the foregoing, the deposition of Mr. Bowman contains the following:

Q. All right, sir. As far as you knew and as far as this unloading of pipe was concerned, did the persons who delivered the pipe there take any part in unloading?

A. They usually roll it off the truck for you.

Q. They roll it off the truck?

A. Um-hum. The truck has a spring on the back of it, like forklifts, that set the pipe down on the ground. They'll always help you unload it. But they're not responsible for it after it's on the ground.

Q. Um-hum.

MR. MEEKINS: Would you say that again?

A. They're not responsible for it after it's on the ground. I don't reckon. Unless it's cracked.

Bowman had earlier testified:

A. The pipe come in, we got it off the trailer and unloaded it and placed it like we normally do and stuck a board up under the pipe to keep it from rolling.

Q. All right.

A. The pipe was chocked so where it wouldn't roll. That's the way we always unload the pipe. Always been taught to unload the pipe that way as to where it wouldn't roll.

He explained that the chock used was a 4 x 4 signpost. He personally placed the post against the pipe. The same day the pipes were unloaded he had to run some children off of them. He was

Broadway v. Blythe Industries, Inc.

unable to say whether other Blythe employees later checked to see whether the chock was still in place or whether, as the pipes were used, they were first taken from the end of the row where the chock had been placed.

Plaintiff offered two affidavits which were intended to show that nothing was done to keep the pipes from being rolled and that the men were warned that children were there when the truck was being unloaded. Lisk argues that the affidavits do not comply with Rule 56(e) and should not be considered. It suffices to say that they fail to show a question of fact as to any breach of duty to plaintiffs intestate for which Lisk is liable.

It is elementary that summary judgment should be entered only when the moving party is entitled to a judgment as a matter of law. We conclude that the pleadings and other matters before the court show, as a matter of law, that plaintiff is not entitled to recover from Lisk.

Defendant had a duty as a contract carrier to safely carry and deliver the pipes to the consignee, Blythe. *Merchant v. Lassiter*, 224 N.C. 343, 30 S.E. 2d 217 (1944); *Insurance Co. v. Transfer and Storage Co.*, 18 N.C. App. 152, 196 S.E. 2d 822 (1973). There is no question in this case regarding defendant's safe delivery of the pipes to the Blythe construction site.

Defendant's duty, however, ended when its driver unloaded and Blythe's foreman accepted the pipes, delivered in good condition. The uncontradicted evidence shows that defendant was not responsible for chocking the pipes to prevent them from rolling once unloaded.

Once delivered into the custody of Blythe's employees, the pipes became the exclusive property of Blythe and the employee of the contract carrier was not authorized to alter Blythe's arrangement of them.

Even if we were to concede *arguendo* that the carrier was negligent in some way at the time the pipes were unloaded we would have to hold, as a matter of law, that such negligence was not a proximate cause of the accident that took place on Blythe's job site eleven days later. Blythe's alleged intervening negligence over the eleven day period insulates, as a matter of law, any

Broadway v. Blythe Industries, Inc.

alleged negligence of Lisk because it broke all causal connections between the conduct of Lisk's driver and the ultimate injury. *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808 (1940).

Affirmed.

Judge HEDRICK concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

Plaintiff's forecast of evidence indicates that when the pipes were delivered and placed on an incline, a nearby resident observed this situation, observed that the pipes had not been secured against rolling, warned defendant Lisk's driver of the presence of children in the area, and inquired if defendant Lisk's driver was going to do anything to secure the pipes; to which inquiry, there was no response. On the other hand, defendant's forecast of evidence shows a conflicting version by defendant's witnesses as to what was done to secure the pipes. In his deposition, defendant's driver testified that defendant Blythe's employees secured the pipes with bricks and rocks, while defendant Blythe's foreman testified that he secured the pipes with a 4 x 4 piece of signpost.

Under this forecast of evidence, there arises a genuine issue of material fact as to whether defendant Lisk was negligent in leaving the pipes unsecured on an incline when he knew, or reasonably should have known, that the pipes might roll and injure someone.

I am also convinced that there is a genuine issue as to whether defendant Lisk's negligence continued to the time of plaintiff intestate's injury and combined with that of defendant Blythe to cause the injury. If so, defendant Lisk's negligence was not insulated by the negligence of defendant Blythe. See *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984).

Phillips v. Integon Corp.

JAMES R. PHILLIPS AND CYNTHIA H. PHILLIPS v. INTEGON CORPORATION, INTEGON GENERAL INSURANCE CORPORATION, INTEGON INDEMNITY CORPORATION AND NEW SOUTH INSURANCE COMPANY

No. 8318SC1149

(Filed 18 September 1984)

Insurance § 79.1; Unfair Competition § 1— unfair rate fixing—action under Unfair Trade Practices Act permitted

G.S. Chapter 58 does not provide the exclusive remedy for those damaged by unfair trade practices in the insurance industry, and allegations of unfair fixing of insurance rates should be permitted to be raised under G.S. 75-5 as well.

APPEAL by plaintiff from *Albright, Judge*. Judgment entered 1 August 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 August 1984.

In 1968 plaintiff James R. Phillips and the defendant Integon companies entered into a retrospective agency agreement under which plaintiff brokered nonstandard automobile physical damage insurance for defendants. Plaintiff contends that in the fall of 1980 defendants began competing in the sale of this insurance with the purpose of destroying the business of plaintiff and other competitors. Plaintiff alleges that defendants engaged in anti-competitive acts and practices which had the effect of restraining trade and creating a monopoly in the automobile insurance market. He claims that defendants intended to fix a higher price for the insurance once they had eliminated the competition. Plaintiff alleges that as a result of these practices, his business was damaged.

Plaintiff filed suit under G.S. 75-16, alleging that defendants had violated Chapter 75 and had breached their agency agreement with him. Plaintiff sought damages in the amount of \$500,000 for operating losses and \$2,500,000 for lost profits, along with attorneys' fees. Defendants moved pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure that the action be dismissed for failure to state a claim upon which relief could be granted.

On 11 July 1983 the trial court dismissed plaintiff's claims based on defendants' alleged violations of G.S. 75-5(b)(3), (4) and

Phillips v. Integon Corp.

(5). On 12 July 1983, upon ruling that there was no just reason to delay the entry of final judgment, the court certified the judgment for immediate review by appeal. From these proceedings, plaintiff appeals.

Adams, Kleemeier, Hagan, Hannah and Fouts, by Clinton Eudy, Jr. and Richard D. Ehrhart, for plaintiff appellant.

Nichols, Caffrey, Hill, Evans and Murrelle, by William D. Caffrey, Edward L. Murrelle and Richard J. Votta, for defendant appellees.

ARNOLD, Judge.

Plaintiff contends that the claims for relief based on G.S. 75-5(b)(3), (4) and (5) were improperly dismissed. A claim is subject to dismissal upon a Rule 12(b)(6) motion only if it appears to a certainty that there are no facts which, if proved, would entitle the claimant to relief. *Sutton v. Duke*, 277 N.C. 94, 102-03, 176 S.E. 2d 161, 166 (1970). The primary issue on appeal, therefore, is whether it appears to a certainty that there exists no facts which, if proved, would entitle plaintiff to relief against defendants on the basis of their alleged violations of G.S. 75-5(b)(3), (4) and (5). We find that such facts do exist and hold that the trial court improperly dismissed plaintiff's claim.

It appears that, in ordering a dismissal of plaintiff's claim, the trial court agreed with defendants' contention that Chapter 58 is intended to regulate insurance companies exclusively, thereby precluding plaintiff from seeking recourse under Chapter 75.

Section 58-124.23 reads in pertinent part:

(a) No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this State which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the Bureau. . . .

(b) A rate in excess of that promulgated by the Bureau may be charged on any specific risk provided such higher rate is charged with the approval of the Commissioner and with the knowledge and written consent of the insured.

Phillips v. Integon Corp.

In instituting this action, plaintiff alleged violations of G.S. 75-5(b), which states in part:

In addition to the other acts declared unlawful by this Chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:

. . . .

(3) To willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed.

(4) While engaged in buying or selling any goods within the State, through himself or together with or through any allied, subsidiary or dependent person, to injure or destroy or undertake to injure or destroy the business of any rival or competitor, by unreasonably raising the price of any goods bought or by unreasonably lowering the price of any goods sold with the purpose of increasing the profit on the business when such rival or competitor is driven out of business, or his business is injured.

(5) While engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another.

Moreover, in part (a), the statute states:

- (1) "Person" includes any person, partnership, association or corporation;
- (2) "Goods," include goods, wares, merchandise, articles or other things of value. (Emphasis added.)

The crux of defendants' argument that Chapter 58 exclusively regulates the insurance industry is their contention that Chapter 75 did not apply historically to insurance claims. Defendants

Phillips v. Integon Corp.

concede, however, that G.S. 75-1.1 has recently been interpreted to provide a remedy for unfair trade practices in the insurance industry. We believe that allegations of unfair fixing of insurance rates should be permitted to be raised under G.S. 75-5 as well and reject defendants' claim that any expansion of Chapter 75 should be limited only to G.S. 75-1.1. Section 75-1.1 contains a general prohibition of unfair methods of competition and unfair or deceptive practices affecting commerce, while Section 75-5 lists particular acts that constitute unfair or deceptive acts. If a cause of action relating to insurance practices can arise under the first, then surely it also can arise under the second.

In *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271 (1980), this Court held that a plaintiff could recover damages for unfair trade practices in the insurance industry under G.S. 75-1.1. In construing the scope of Section 75-1.1, we found persuasive the rationale expressed in *Ray v. United Family Life Insurance Co.*, 430 F. Supp. 1353 (W.D.N.C. 1977), where a federal court held that Chapter 75 was applicable to the sale of insurance.

In *Ray*, the court rejected the defendants' argument that unfair methods of competition perpetrated by persons engaged in the insurance industry are regulated exclusively by the insurance statutes, G.S. 58-54.1 through 58-54.13. Rather, the court stated, "[t]he very language of the Declaration of Purpose itself reveals that the intent of §§ 58-54.1 *et seq.* is to oust *federal* antitrust regulation of the business of insurance in North Carolina, *not* to exempt that business from other *North Carolina* regulations." 430 F. Supp. at 1356. Although certainly not bound by the decision in *Ray*, we agree that Chapter 58 does not provide the exclusive remedy for those damaged by unfair trade practices in the insurance industry.

Several other factors lead us to this conclusion. First, we find no authority which expressly declares that Chapter 58 is the exclusive vehicle for obtaining relief from those who engage in unfair trade practices in the insurance industry.

Second, G.S. 75-5(b)(3), (4) and (5) address fixing the price of "goods." Goods are defined in the statute to include "other things of value." An insurance policy is a thing of value.

State v. Burch

Third, we believe that any conflicts between the statutes can be reconciled. G.S. 75-5 is concerned with protecting competitors from predatory business practices, including the fixing of unreasonably low prices with the purpose of lessening competition. On the other hand, G.S. 58-124.23(b) is concerned with protecting the insurance consumer from excessive rates. In responding to deviations from approved rates, the Commissioner makes no attempt to determine whether the rates are being charged with anticompetitive purpose or effect. His determination is restricted solely to seeing that the rates do not exceed the approved ceiling. For the foregoing reasons, we find that plaintiff has alleged a sufficient claim to recover for unfair trade practices in the insurance industry under G.S. 75-5. The trial court's order dismissing plaintiff's action is, therefore,

Reversed.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. SAMUEL OWEN BURCH

No. 839SC1266

(Filed 18 September 1984)

1. Searches and Seizures § 3— marijuana growing within curtilage—warrantless seizure improper

In a prosecution of defendant for possession of marijuana with intent to sell and manufacture of marijuana, the trial court erred in denying defendant's motion to suppress the marijuana evidence made on the ground that it was obtained from within the defendant's curtilage without either a search warrant or circumstances justifying an exception to the warrant requirement, *since the marijuana was growing near a garage and recreation building, but these were not open to the public; the marijuana was concealed by a brush pile; from defendant's dwelling to the brush pile, there was sown grass which defendant mowed with a regular yard mower; a privy located beyond the brush pile and a cider press beyond the privy were still in use; and the curtilage thus extended at least as far as the brush pile.*

2. Searches and Seizures § 5— warrantless seizure of marijuana plants—plain view rule inapplicable

The State could not argue that a warrantless seizure of marijuana plants was made pursuant to the "plain view" doctrine where officers went to defend-

State v. Burch

ant's premises for the openly expressed purpose of searching for marijuana, and the State offered no evidence indicating any prior justification for the officers' presence on defendant's property other than their desire to find marijuana plants.

APPEAL by defendant from *Herring, Judge*, and *Friday, Judge*. Judgment entered 8 September 1983 in Superior Court, PERSON County. Heard in the Court of Appeals on 29 August 1984.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General James C. Gulick, for the State.

Ramsey, Hubbard, Galloway & Cates by Mark Galloway, for defendant appellant.

BRASWELL, Judge.

The jury convicted the defendant of the possession of marijuana with intent to sell and the manufacture of marijuana. Prior to trial before Judge Herring, the defendant had made a motion before Judge Friday to suppress the marijuana evidence on the grounds that it was obtained from within the defendant's curtilage without either a search warrant or circumstances justifying an exception to the warrant requirement. This motion was denied. On appeal, the defendant assigns as error the denial of his motion to suppress as well as certain evidentiary rulings made by the trial court and a portion of the judge's charge to the jury. From our careful review of the record, we reverse the denial of the defendant's motion to suppress and remand for a new trial.

On 28 August 1982, at approximately 1:00 p.m., two S.B.I. agents and two officers from the Person County Sheriff's Department drove in two trucks out to the defendant's farm house. They parked in a tobacco road which lay perpendicular to the main highway and fifty feet from the left side of the defendant's farm house. This farm road was not a state road and served only the outbuildings, garage, and tobacco fields located behind the defendant's house. When the trucks arrived, the defendant's girl friend came out of the house to find out what the men wanted. The defendant was out of town on a construction job. She was told by S.B.I. Agent Boulus that they intended to search the property for

State v. Burch

marijuana. Agent Boulus and two of the other men began to search the area even though they had not obtained a search warrant nor anyone's permission to do so. They walked down the road behind the defendant's house, into the woods, and to the tobacco fields, but found no marijuana. The fourth officer walked around the defendant's house, then proceeded back to the truck which contained marijuana which the officers had seized earlier that day. Agent Boulus received a communication from the officer at the truck that the defendant's girl friend, after having contacted a lawyer, stated that if they did not have a search warrant they must leave the premises. As the other officers were preparing to leave and Agent Boulus was walking back to the trucks, he looked over to his left and saw the tops of a number of marijuana plants growing within a brush pile behind the defendant's house. The brush pile surrounded the marijuana on three sides: the back side facing the crib, the front side facing the house, and the left side facing the farm road. The officers then went over to the marijuana, cut down forty-three plants, and carried it away.

The brush pile, concealing the marijuana plants, was located approximately eighty-four feet behind the defendant's house. A short distance behind the brush pile was a small crib, a privy, a cider press and cider barrels. Farther still from the house and 166 feet from the crib was a recreation building which contained a piano, pool table, refrigerator, and refreshments. A private garage with junked cars, parts, and tools scattered about was located 146 feet from the recreation building. There was sown and mown grass around the defendant's house, between the house and the marijuana patch, along the side of the crib, and between the farm road and recreation structure.

[1] The primary issue for our determination is whether the trial court erred by denying the defendant's motion to suppress the evidence seized during the warrantless search of his property. First of all, although the trial court failed to make the appropriate findings of fact and conclusions of law as required by G.S. 15A-977(f) (*see also State v. Ladd*, 308 N.C. 272, 278, 302 S.E. 2d 164, 168 (1983)), it is apparent from the record of the judge's statements that he denied the defendant's motion on the basis that

State v. Burch

the evidence conclusively establishes that he [defendant] was operating a recreational establishment down there, and he had a garage, and these, of course, are public places and indicate to the Court that anyone had a right to go in there.

However, the State in its brief concedes that "the evidence does not support Judge Friday's apparent finding of fact that the garage and recreation building were generally open to the public as public establishments." From our review of the evidence presented at the suppression hearing, the State has wisely conceded this point because we also can find no evidence presented by either side which tended to show that these outbuildings were open by the defendant to the public.

Nevertheless, the State argues that the search and seizure was lawful because it was conducted in an area it contends was an open field. The most recent word from the United States Supreme Court on the "open fields" doctrine can be found in *Oliver v. United States*, --- U.S. ---, 104 S.Ct. 1735, 80 L.Ed. 2d 214 (1984), also a case where the police made a warrantless search of marijuana fields. The *Oliver* court reiterated that the liberty interest protected by the Fourth Amendment is freedom from unreasonable searches and seizures in those places and things where the person has a "'reasonable expectation of privacy.'" *Id.* at ---, 104 S.Ct. at 1740, 80 L.Ed. 2d at 223, *quoting Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed. 2d 576, 587 (1967). Because at common law no expectation of privacy attached to an open field, the Court held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, *except in the area immediately surrounding the home.*" (Emphasis added.) *Id.* at ---, 104 S.Ct. at 1741, 80 L.Ed. 2d at 224. Thus, the crucial question in our case becomes whether or not the brush pile was a part of this protected area surrounding the home, known as the curtilage.

As observed in *Rosencranz v. United States*, 356 F. 2d 310, 313 (1st Cir. 1966), "[t]he reach of the curtilage depends on the facts of a case." *See also State v. Boone*, 293 N.C. 702, 709, 239 S.E. 2d 459, 463 (1977). A careful review of the evidence presented in this case indicates that the brush pile concealing the marijuana plants was in fact a part of the curtilage. The curtilage naturally began at the defendant's house. From his dwelling to

State v. Burch

the brush pile, there was sown grass which the defendant mowed with a regular yard mower. Furthermore, according to the defendant's testimony, although a toilet facility had been installed inside the house approximately one year earlier, the privy located further from the house and between the brush pile and the cider press was still in use. Only a short distance behind the privy was a cider press which the defendant also currently used. Since there was no evidence that the recreation building and the garage were public establishments, it is arguable that the curtilage even continued down to these structures, being an area "to which the activity of the home life extend[ed]." *Oliver v. United States, supra*, at ---, 104 S.Ct. at 1743, fn. 12, 80 L.Ed. 2d at 226, fn. 12. However, for our purposes and on the facts of this case, we need only to recognize that the curtilage extended at least as far as the brush pile where the marijuana was located. Because the marijuana was within the curtilage, it was unlawful for the officers to search the area and seize the plants without a search warrant or other circumstances justifying an exception to the warrant requirement. We hold that since the evidence seized should have been suppressed at trial, the judge at the suppression hearing erred by denying the defendant's motion to suppress.

[2] Equally unavailable to the State on the facts of this case is the "plain view" doctrine. This doctrine requires that:

First, the officers must have prior justification for the intrusion onto the premises being searched (other than observing the object which is later contended to have been in plain view). Secondly, the incriminating evidence must be *inadvertently discovered* by the officers while on the premises.

State v. Williams, 299 N.C. 529, 532, 263 S.E. 2d 571, 573 (1980). The fact is uncontroverted that the officers in the case before us went to these premises for the openly, expressed purpose of searching the property for marijuana. In fact, Agent Boulus announced this intention to the defendant's girl friend when they arrived. The State offered no evidence indicating any prior justification for the officers' presence on the defendant's property other than their desire to find marijuana plants. Moreover, the State cannot now successfully argue that the officers inadvertently discovered in plain view the very evidence they had gone on the defendant's property without a search warrant to uncover.

State v. Tarrant and State v. Davis

Because the same errors are unlikely to occur on a retrial of this case, we refrain from discussing the defendant's remaining assignments of error. For the reasons herein set out, the judge's ruling denying the defendant's motion to suppress is reversed and this case is remanded for a new trial.

Reversed and remanded.

Judges HILL and BECTON concur.

STATE OF NORTH CAROLINA v. MICHAEL TARRANT

STATE OF NORTH CAROLINA v. BERNARD DAVIS

No. 8326SC1202

(Filed 18 September 1984)

1. Robbery § 5.4— robbery with dangerous weapon—failure to instruct on common law robbery—no error

Where the evidence tended to show that one defendant held a knife, which he had taken from the victim, to the victim's throat and had the other defendant go through the victim's pockets and the victim's billfold was removed, the trial court properly instructed on robbery with a dangerous weapon and did not err in failing to instruct on the lesser offense of common law robbery.

2. Robbery § 5.4— robbery with dangerous weapon—failure to instruct on simple assault—error not prejudicial

Where the State's evidence tended to show that one defendant held a knife at the victim's throat while the other defendant removed his wallet, but defendants' evidence tended to show that one defendant assaulted the victim following an insult, took the knife from the victim in self-defense, used it only to restrain the victim until the other defendant searched him for weapons, and neither defendant took anything from the victim, the trial court erred in failing to instruct the jury on simple assault as a lesser included offense of robbery with a dangerous-weapon; however, defendants failed to object prior to the jury's retiring to consider its verdict, thus subjecting their appeal to dismissal, and the judge's error did not have probable impact on the jury's finding of guilt and so did not constitute "plain error" which would require reversal.

State v. Tarrant and State v. Davis

APPEAL by defendants from *Kirby, Judge*. Judgment entered 14 July 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 23 August 1984.

This is a criminal action in which defendants were convicted at a jury trial of robbery with a dangerous weapon in violation of G.S. 14-87.

At the trial of this action, the State's evidence tended to show that on 1 December 1982, the victim, Willie Noles, came to Charlotte for the purpose of Christmas shopping. While there, he went to a fast food restaurant where he received change for a hundred dollar bill, one of five one hundred dollar bills then in his possession. The victim then took a bus to North Tryon Mall. While on the bus, he noticed the two defendants, Tarrant and Davis, who were also on the bus.

The State's evidence further tends to show that the victim got off the bus and went into the mall parking area where the defendant Tarrant called to him, approached him and pushed him. The victim pulled a pocketknife from his rear pocket to defend himself and defendant Tarrant took it away from him. In the course of these events, the victim was cut by the knife. Shortly thereafter, defendant Davis, who had been in a nearby wooded area, came across the street and found defendant Tarrant standing over the victim, who was then on the ground. Defendant Tarrant had the knife at the victim's throat. He then instructed defendant Davis to go through the victim's pockets to "see what he could find." The victim's billfold was removed. Defendants Tarrant and Davis ran from the scene but were apprehended by police. The billfold was not recovered.

At trial, both defendants offered evidence tending to show that they were together at the Sunshine Drug Company on 1 December 1984. While there they saw the victim drinking beer. The victim, who appeared to the defendants to be intoxicated, was waving a knife in a threatening manner. Both defendants were going to North Tryon Mall and, by coincidence, took the same bus as the victim. When the bus arrived at North Tryon Mall, the defendants got off the bus, along with the victim, and defendant Davis went into some nearby woods.

State v. Tarrant and State v. Davis

Defendant Tarrant's evidence tended to show that as he was crossing the street, the victim called out a racial slur directed towards Tarrant. Defendant Tarrant pushed and tripped the victim, who then produced a pocketknife which defendant Tarrant took away from the victim, allegedly to protect himself. About the same time, defendant Davis returned and defendant Tarrant instructed him to search the victim for any other weapons. Nothing was removed from the victim's pockets. Both defendants heard horns blowing and ran from the area.

From a verdict of guilty of robbery with a dangerous weapon and judgment of imprisonment, both defendants appeal.

Attorney General Edmisten by Assistant Attorney General James E. Magner, Jr., for the State.

Scott T. Pollard and Dozier, Brackett, Miller, Pollard and Murphy, by Fritz Y. Mercer, Jr., for the defendant-appellants.

EAGLES, Judge.

I

[1] The trial judge submitted two possible verdicts to the jury, guilty of robbery with a dangerous weapon and not guilty. Defendants argue on appeal that the trial court erred in failing to instruct on and to submit as possible verdicts the lesser included offenses of common law robbery and simple assault.

As a general rule, when there is evidence of a defendant's guilt of a crime which is a lesser included offense of the crime stated in the bill of indictment, the defendant is entitled to have the trial judge submit an instruction on the lesser included offense to the jury. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). Common law robbery is a lesser included offense of armed robbery or robbery with a firearm or other dangerous weapon and an indictment for armed robbery will support a conviction of common law robbery. *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974); *State v. Allen*, 47 N.C. App. 482, 267 S.E. 2d 514 (1980). Nevertheless, the trial judge is not required to instruct on common law robbery when the defendant is indicted for armed robbery if the uncontradicted evidence indicates that the robbery, if perpetrated, was accomplished by the use of what appeared to be

State v. Tarrant and State v. Davis

a dangerous weapon. *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1980).

The uncontradicted evidence offered by the State from the victim and eyewitnesses tends to show that, for whatever reason, the defendant Tarrant held a knife, which he had taken from the victim, to the victim's throat and had the defendant Davis to go through the victim's pockets. If there was a robbery, it was accomplished while Tarrant was holding a knife to the victim's throat.

Defendants contend that they were committing no crime at this point, that nothing was taken and that the knife was used in self-defense. Nevertheless, a knife was used and we hold that the trial judge was correct in refusing to instruct as to common law robbery.

II

[2] We next consider whether the trial judge erred in refusing to instruct and charge the jury on the crime of simple assault, which is also a lesser included offense of robbery with a dangerous weapon. The necessity for instructing the jury as to a lesser included crime arises only when there is evidence from which the jury could find that the included crime of lesser degree was committed. The presence of evidence is the determinative factor. *State v. Hicks*, 241 N.C. 156, 159-60, 84 S.E. 2d 545, 547 (1954); *State v. Allen*, *supra*.

Defendants' evidence tended to show that defendant Tarrant assaulted the victim by pushing and tripping him after the victim insulted him, that the knife was taken from the victim in self-defense and used only to restrain the victim until defendant Davis searched him for other weapons and that nothing was stolen from the victim. There is, at least, conflicting evidence relating to the elements of the crime charged. For this reason it was error for the trial judge not to instruct the jury as to the crime of simple assault.

However, Rule 10(b)(2) of our Appellate Rules of Procedure as amended 10 June 1981 and applicable to cases tried on and after 1 October 1981, requires that a party assigning as error any portion of the jury charge or an omission therefrom make an objection be-

State v. Tarrant and State v. Davis

fore the jury retires to consider its verdict. There is nothing in the record that indicates an objection was timely made prior to the jury retiring to consider its verdict. Further, defendants failed to identify the omitted instructions and set out their substance immediately following the instructions given as is also required by Rule 10(b)(2). Our Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. *Marisco v. Adams*, 47 N.C. App. 196, 266 S.E. 2d 696 (1980).

III

We next consider whether the trial judge's error in failing to charge on simple assault as a lesser included offense of robbery with a dangerous weapon constituted "plain error." The "plain error" rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record it can be said that the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done. The error must have probable impact on the jury's finding of guilt. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

We have carefully reviewed the entire record in this case and we hold that the error in the charge did not have probable impact on the jury's finding of guilt. We reach this conclusion after due consideration of *State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980) which was decided prior to the Supreme Court's adoption of the current amendment to Rule 10(b)(2), Rules of Appellate Procedure. Here, the State's evidence was more than sufficient to support a conviction for robbery with a dangerous weapon.

On the facts of this case, the trial judge's refusal to charge on the crime of simple assault as a lesser included offense of robbery with a dangerous weapon is not prejudicial error and does not rise to "plain error."

No error.

Judges ARNOLD and WHICHARD concur.

Short v. General Motors Corp.

GAIL HARRIS SHORT, ADMINISTRATRIX OF THE ESTATE OF CHARLES MCCOY SHORT, JR., AND GAIL HARRIS SHORT, INDIVIDUALLY v. GENERAL MOTORS CORPORATION AND J & M CHEVROLET-OLDS, INC.

No. 8310SC1152

(Filed 18 September 1984)

1. Evidence § 18— experimental evidence—admissibility

In an action to recover damages for the death of plaintiff's husband who was killed when the accelerator of his pickup truck allegedly stuck and he ran into a bridge abutment, the trial court did not err in admitting evidence of experimental test drives by expert witnesses for defendant, and the fact that an expert witness drove his truck with full control of the acceleration, while deceased allegedly experienced uncontrolled acceleration, was not such a dissimilarity as to bar evidence of the experiments.

2. Evidence § 27— videotapes of experimental evidence—corroboration—admissibility

The trial court did not err in admitting videotapes of defendant's experimental evidence, since the experts who made comments on the videotapes testified at trial and were available for cross-examination, and the recorded statements were properly admitted as corroborative evidence to strengthen the credibility of the experts' testimony.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 14 February 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 30 August 1984.

Plaintiff sued to recover damages for the death of her husband, who was killed when the pickup truck he was driving ran into a bridge abutment. The truck had been purchased from defendant J & M Chevrolet-Olds about six months before the accident. Plaintiff's husband had returned the truck to the dealer twice with a complaint of uncontrolled acceleration, a problem that allegedly continued to the day of the accident.

The jury found that plaintiff's husband did not die as a result of any breach of warranty or negligence by defendant General Motors. Plaintiff has not appealed as to General Motors. The jury further found that the negligence of J & M Chevrolet-Olds (hereafter defendant) was a cause of the accident, but that the deceased was contributorily negligent.

From a judgment entered on the verdict, dismissing the action with prejudice, plaintiff appeals.

Short v. General Motors Corp.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay and Robert W. Sumner, for plaintiff appellant.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and Richard B. Conely, for defendant appellee.

WHICHARD, Judge.

[1] Plaintiff contends the court erred in admitting evidence of experimental test drives by expert witnesses for defendant. The rule regarding admissibility of evidence of experiments is set forth in *State v. Jones*, 287 N.C. 84, 98, 214 S.E. 2d 24, 34 (1975), as follows:

Although experimental evidence should be received with great care, it is admissible when the trial judge finds it to be relevant and of probative value. Even upon such finding the admission of experimental evidence is always subject to the further restriction that the circumstances of the experiment must be *substantially* similar to those of the occurrence before the court. Whether substantial similarity does exist is a question which is reviewable by the appellate courts in the same manner as is any other question of law.

(Emphasis in original; citations omitted.) Precise reproduction of circumstances is not required, particularly where any differences are explainable by an expert witness. *Id.* at 99, 214 S.E. 2d at 34. "Discrepancies in conditions do not necessarily affect the admission of the evidence, but, rather, go to its weight with the jury." *State v. Wright*, 52 N.C. App. 166, 174, 278 S.E. 2d 579, 586, *disc. rev. denied*, 303 N.C. 319 (1981), *citing State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85, *cert. denied*, 409 U.S. 870, 34 L.Ed. 2d 121, 93 S.Ct. 198 (1972).

Testimony from eyewitnesses to the accident indicated that the deceased's truck partially left the road about three hundred thirteen feet before the bridge, so that the right wheels were on the dirt shoulder and the left wheels were on the pavement. The truck then ran in a straight line and at a constant rate of speed into the bridge abutment. One eyewitness estimated its speed at approximately thirty-five to forty-five miles per hour, while another believed the truck was going faster than the forty-five mile per hour speed limit. According to the witnesses, the de-

Short v. General Motors Corp.

ceased was leaning over to his right as if he were securing something from the floor of the cab. He sat up about fifty to one hundred feet before he hit the bridge.

A highway patrolman testified that he had been riding in the truck with the deceased earlier on the day of the accident when they experienced uncontrolled acceleration. The deceased had corrected the problem by manipulating the accelerator pedal with his right hand while maintaining control of the truck and steering with his left hand.

In defendant's experiments, an expert witness drove a pickup truck substantially similar to the one driven by the deceased along the path taken by the deceased immediately prior to the accident. Plaintiff contends the experiments were not conducted under conditions substantially similar to those under which the accident occurred because defendant's expert witness drove his truck with full control of the acceleration, whereas the deceased allegedly experienced uncontrolled acceleration. We disagree.

The main purpose of defendant's experiments was to show that in order to keep the truck on a straight line, as he did, the deceased had to have had steering control of the vehicle; therefore he could have brought it back onto the highway before hitting the bridge. Thus, it was necessary for the expert to drive the same path as the deceased at approximately the same speed, and to steer the truck back onto the road fifty to one hundred feet before reaching the bridge. It was not necessary that the experimental truck have an uncontrolled acceleration problem, since it traveled at roughly the same speed as the deceased's truck, a speed which eyewitnesses said was constant.

The experiments tended to show that the deceased, after straightening up in the cab, could have steered his truck back onto the road at the speed he was traveling. The possibility that his accelerator pedal was stuck, and that this affected the deceased's ability to maneuver the truck, was an alleged discrepancy which the jury could believe or disbelieve. If the jury believed plaintiff's theory of uncontrolled acceleration, it could weigh that factor as it felt proper when evaluating defendant's experiments. It was not a factor, however, that necessarily prevented the deceased from avoiding the bridge abutment; and it therefore was

Short v. General Motors Corp.

not such a significant dissimilarity from the experiments as to bar their admissibility.

Plaintiff further argues that defendant's experiments did not account for the presence of oncoming traffic. At the time the deceased hit the bridge abutment there was an oncoming vehicle. The oncoming vehicle may have interfered with the deceased bringing his truck back onto the road. Again, however, that factor went to the weight of the evidence with the jury. The oncoming vehicle was in the other lane and over two hundred feet away. It was not an obstacle which necessarily prevented the deceased from steering safely back onto the road. It therefore was not a difference that could have rendered the experiments unreliable or misleading to the jury with respect to the issue of contributory negligence.

Plaintiff contends the court erred in admitting videotapes of defendant's experiments. She argues that the videotapes lacked relevance in that they depicted test drives made under conditions not substantially similar to the accident situation. Having held that defendant's experiments were conducted under conditions substantially similar to those of the accident situation, we reject plaintiff's argument on relevancy.

[2] Plaintiff further argues that the court erred in admitting the videotapes because they contained unsworn hearsay testimony. Defendant's expert witnesses made comments in the videotapes describing the experiments as they performed them. The experts also described the experiments at trial and were available for cross-examination by plaintiff. The court instructed the jury that the videotapes were illustrative evidence, to be considered only to the extent that they corroborated the in-court testimony of defendant's expert witnesses. The recorded statements were not hearsay since they were admitted as corroborative evidence to strengthen the credibility of the experts' testimony, rather than as substantive evidence to prove the truth of the matter asserted therein. *Andrews v. Builders and Finance, Inc.*, 23 N.C. App. 608, 611-12, 209 S.E. 2d 814, 817 (1974), *cert. denied*, 286 N.C. 412, 211 S.E. 2d 793 (1975). *See also* 1 H. Brandis, *North Carolina Evidence* Sections 50-52, 138 (2d rev. ed.). Even if the recorded statements had been admitted erroneously as substantive evidence and therefore hearsay, the availability of the declarants for cross-examina-

Wallace v. Wallace

tion removed the traditional problems associated with hearsay. The error thus would not have been prejudicial. *See State v. Satterfield*, 27 N.C. App. 270, 272, 218 S.E. 2d 504, 505 (1975).

No error.

Judges ARNOLD and EAGLES concur.

GEORGIA MARIE WALLACE v. BRUCE EVANS WALLACE

No. 8321DC1098

(Filed 18 September 1984)

Divorce and Alimony § 16.6— adultery—opportunity and inclination required

In order to establish adultery the evidence, whether circumstantial or direct, must tend to show both opportunity and inclination to engage in sexual intercourse, and when the evidence shows no more than an opportunity, an issue of adultery should not be submitted; therefore, the trial court in an action for alimony erred in denying defendant's motion for directed verdict where plaintiff's evidence supported only an inference that defendant on three occasions had an opportunity to engage in adulterous conduct, but allowed no reasonable inference of inclination on defendant's part to engage in such conduct.

APPEAL by defendant from *Alexander, Judge*. Judgment entered in FORSYTH County District Court 20 May 1983. Heard in the Court of Appeals 22 August 1984.

Plaintiff wife brought an action against defendant husband for alimony, alleging indignities and adultery on the part of defendant. At trial, plaintiff's evidence as to the alleged indignities and adultery consisted of plaintiff's testimony and the testimony of H. D. Hemmings, a private investigator employed by plaintiff.

Plaintiff's evidence, in pertinent part, tended to show the following events and circumstances. Plaintiff and defendant were married in 1954 and lived together until 6 January 1982, when defendant left their home in Winston-Salem and moved to a farm owned by them near East Bend, in Yadkin County. After being hospitalized for alcoholism and psychiatric treatment, defendant returned about 15 March 1982 to the parties' Winston-Salem resi-

Wallace v. Wallace

dence. Defendant moved out again about 4 April 1982. Prior to their separation, defendant had been chronically addicted to alcohol, and more recently, had developed problems from the use of tranquilizers. Defendant often withdrew himself from plaintiff's company and verbally abused plaintiff.

Plaintiff employed detective Hemmings, informing Hemmings that defendant might be found at their East Bend farm or at a condominium defendant owned in Asheville. Plaintiff provided photographs of defendant and information about defendant's automobile to Hemmings. Hemmings began surveillance of defendant in the early morning hours of 6 April 1982 by going to defendant's farm at East Bend. There, Hemmings observed defendant's car and another car, later determined to be owned by a female person, not defendant's wife. Defendant and the woman were seen leaving the farm house at about 10:30 a.m. on 6 April. Hemmings followed them to a Winston-Salem residence, arriving there about 10:56 a.m., where they stayed until about 12:47 p.m. Defendant and the woman then went to a Winston-Salem restaurant, where they stayed until 1:26 p.m. On 7 April 1982, Hemmings observed defendant enter a motel in Asheville, then later observed the same woman he had seen with defendant on 6 April enter the same motel. He also observed defendant and the woman drive together to the Asheville airport and to an Asheville restaurant. Defendant's car and the woman's car remained at the motel throughout the night of 7 April. On the evening of 25 April 1982, Hemmings observed defendant enter his Asheville condominium. The same woman later entered the condominium. The next morning, defendant left the condominium at about 8:37 a.m. and the woman left the condominium at about 9:50 a.m.

The jury answered the issue of indignities "No," for defendant, and answered the issue of adultery "Yes," against defendant.

Following a hearing on needs and capacity, the trial court found plaintiff to be a dependent spouse, defendant to be the supporting spouse, and awarded plaintiff substantial alimony.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, Daniel E. O'Toole, and Randolph M. James, for plaintiff.

Clyde C. Randolph, Jr. and David F. Tamer, for defendant.

Wallace v. Wallace

WELLS, Judge.

The sole issue we decide in this case is whether the trial court erred in failing to grant defendant's motion for a directed verdict on the issue of adultery. We decide this issue in defendant's favor and reverse.

The difficult issue of adultery has been the subject of two recent opinions of this court.

In *Owens v. Owens*, 28 N.C. App. 713, 222 S.E. 2d 704, *disc. rev. denied*, 290 N.C. 95, 225 S.E. 2d 324 (1976), defendant husband asserted a defense of adultery to plaintiff wife's claim for alimony. Defendant's evidence tended to show that plaintiff wife had lived with another man for two months. The trial court refused to submit an issue as to plaintiff wife's adultery. In reversing, the *Owens* court discussed at some length conflicts among the authorities on the level of proof required to establish adultery, concluding that while adultery may be proven by circumstantial evidence, such evidence must be more than that which raises a suspicion or conjecture and must show more than mere opportunity. The court summed up its holding as follows:

We consider it unwise to adopt general rules as to what will or will not constitute proof of adultery, but the determination must be made with reference to the facts of each case. In some cases evidence of opportunity and incriminating or improper circumstances, without evidence of inclination or adulterous disposition, may be such as to lead a just and reasonable man to the conclusion of adulterous intercourse. . . . If so, the evidence should be submitted on an issue of adultery to the jury so that it may judge the probative force of the evidence. [Citation omitted.]

In *Horney v. Horney*, 56 N.C. App. 725, 289 S.E. 2d 868 (1982), plaintiff wife, in her action for divorce, asserted adultery on the part of defendant husband. Plaintiff wife's evidence tended to show that defendant husband had a friendly relationship with another woman, with whom he was alone together on several occasions in the woman's office and on at least one occasion in the woman's home; defendant husband refused to sleep with plaintiff wife and was often away in the evenings; and defendant husband once offered plaintiff wife \$10,000.00 if she would let him see his

Wallace v. Wallace

girl friend. The jury found the issue of adultery in favor of plaintiff wife. In reversing, the court in *Horney* recognized that circumstantial evidence may be sufficient to support a finding of adultery, but concluded that the lack of a clear evidentiary standard in such cases had resulted in trial by "suspicion and conjecture." The court's comments in *Horney* upon *Owens v. Owens*, *supra*, can only be regarded as placing *Owens* in the trial by "suspicion and conjecture" category.¹

Following its discussion of what it perceived to be the unsatisfactory state of affairs in the law of adultery, the court in *Horney* concluded:

Given the highly emotional nature of the subject matter, and the degree to which individual jurors' attitudes regarding propriety may vary, we feel a more definite line must be drawn between permissible inference and mere conjecture. In the case at bar, the husband was shown to have been alone with another woman on a few occasions in her office and once or twice at her home. There was no evidence showing that they were found together very late at night, in a state of undress or under otherwise suspicious circumstances. Nor was there any evidence of feelings of "love" or of affectionate behavior between the two. All we apparently have are bits and pieces of circumstantial evidence from which the jury concluded that an adulterous affair had taken place. We cannot find that this was enough evidence on which to adjudicate the parties' legal rights. Indeed, to hold otherwise would be to subject virtually all friendships between men and women, however innocent, to legal scrutiny.

It is our opinion that this attempt by the court in *Horney* to draw a more definite line, while commendable, failed to achieve that degree of certainty required in such cases. For instance, the suggestions in *Horney* that "being found together very late at night" or "under otherwise suspicious circumstances" might provide the basis for a finding of adultery, still leaves far too much to conjecture. We cannot agree that in modern society, where

1. Judge Clark, who wrote the opinion in *Owens v. Owens*, 28 N.C. App. 713, 222 S.E. 2d 704, *disc. rev. denied*, 290 N.C. 95, 225 S.E. 2d 324 (1976), concurred in *Horney v. Horney*, 56 N.C. App. 725, 289 S.E. 2d 868 (1982).

State v. Monroe

adult persons follow widely diverse schedules of work and other activities throughout the day and night, that being alone together late at night is any more or less significant than being alone together at any other time. A standard incorporating "otherwise suspicious circumstances" tends to make the line less, not more, definite.

We are persuaded that the "more definite line" needed to be drawn in adultery cases is to require that in order to establish adultery, the evidence, whether circumstantial or direct, must tend to show both opportunity and inclination to engage in sexual intercourse and that when the evidence shows no more than an opportunity, an issue of adultery should not be submitted.

In this case, taking plaintiff's evidence as true, considering such evidence in the light most favorable to plaintiff and giving plaintiff the benefit of every reasonable inference to be drawn from that evidence, *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982), we hold that plaintiff's evidence supports only an inference that defendant on three occasions had an opportunity to engage in adulterous conduct, but allows no reasonable inference of inclination on defendant's part to engage in such conduct. Under these circumstances, it was error for the trial court to deny defendant's motion for a directed verdict. Accordingly, the judgment below must be and is

Reversed.

Chief Judge VAUGHN and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE MONROE

No. 838SC1216

(Filed 18 September 1984)

1. Criminal Law § 138.7— second-degree murder—sentencing—premeditation and deliberation as aggravating factor

Where defendant was convicted of second-degree murder, the trial court did not err at the sentencing hearing by finding as an aggravating factor that the killing occurred after defendant premeditated and deliberated it, since the evidence showed that defendant went to the motel room of his former lover

State v. Monroe

and deceased at least four times during the weekend of the killing, each time demanding to talk with his lover; he instructed her to get her things and leave with him; defendant went to the room with a gun, threw a rock through the window, and pulled glass out of the window; and defendant then pushed the woman aside, told her to get out of the line of fire, and shot and killed deceased.

2. Criminal Law § 138.7— second-degree murder—sentencing—mental condition—provocation—no mitigating factors

The trial court did not err in failing to find as mitigating factors during the sentencing hearing that defendant was suffering from a mental condition which significantly reduced his culpability for the offense, that he acted under strong provocation or that the relationship between him and the victim was otherwise extenuating, since evidence with regard to defendant's mental condition consisted of a psychiatric opinion regarding defendant's capability to stand trial and thus had no bearing on his mental condition at the time of the offense, and the fact that defendant's actions resulted from jealousy over the victim's relation with his former girl friend was not a proper factor for use in mitigating his punishment.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 26 August 1983 in Superior Court, WAYNE County. Heard in the Court of Appeals 23 August 1984.

Defendant was tried on bills of indictment charging him with first degree murder and discharging a firearm into an occupied building. During the weekend of 26-28 February 1983, Kay Frances Jackson and Kenneth Lee Brinson were staying together at the Motel 6 in Goldsboro, North Carolina. The defendant and Ms. Jackson had previously been lovers, living together, off and on, for approximately nine years prior to the incident. Defendant went to the motel at least four times during that weekend, attempting to talk with Ms. Jackson. Ms. Jackson testified that on the evening of 27 February, defendant brought a gun to the motel.

On the morning of 28 February 1983 defendant knocked on the door of the room in which Ms. Jackson and Mr. Brinson were staying. Getting no response, defendant threw a rock through the window of the room and began to pull the glass out. Ms. Jackson testified that defendant stated "he had lost his job and lost everything and he won't about to . . . take her away from him." Ms. Jackson also testified that defendant pulled a gun, pushed her down and told her to keep out of the line of fire, and then shot at Brinson, who was behind a door trying to protect himself. Mr.

State v. Monroe

Brinson and the defendant struggled. Defendant fired other shots, and killed Brinson.

Defendant entered a negotiated plea of guilty to second degree murder. The State dismissed the charge of firing into an occupied building and the sentencing was left to the discretion of the court.

Second degree murder is a Class C felony. A defendant guilty of this crime must receive a fifteen-year term of imprisonment unless aggravating or mitigating factors merit imposition of a longer or shorter term. *State v. Melton*, 307 N.C. 370, 373, 298 S.E. 2d 673, 676 (1983). As a factor in aggravation of punishment, the court in the case at bar found that the killing occurred after the defendant premeditated and deliberated the killing. In mitigation of punishment, the court found that the defendant has "no record of criminal convictions or a record consisting solely of misdemeanors," and that "prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrong-doing. . . ." N.C. Gen. Stat. § 15A-1340.4(a)(2)(a), (1). The trial judge found that the aggravating factor outweighed the mitigating factors and sentenced defendant to a term of twenty years imprisonment.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard H. Carlton, for the State.

Hulse and Hulse, by H. Bruce Hulse, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred at the sentencing hearing by finding as an aggravating factor that the killing occurred after the defendant premeditated and deliberated it. The defendant argues that upon a review of the evidence presented at the sentencing hearing a determination by the court that a preponderance of the evidence indicated that the defendant premeditated and deliberated the killing was not supported. We disagree.

The evidence showed that the defendant went to the motel room of Ms. Jackson and the deceased at least four times during

State v. Monroe

the weekend of 26-28 February 1983, each time demanding to talk with Ms. Jackson. He told Ms. Jackson to get her things and to leave with him. Ms. Jackson testified that on the evening of 27 February she saw him holding a gun outside the door. The next morning defendant returned with a gun, and threw a rock through the window. He said that "he had lost his job and lost everything and he won't about to take . . . her away from him." Ms. Jackson testified further that defendant pulled glass out of the window, then pushed Ms. Jackson aside and told her to get out of the line of fire, and shot at Brinson, who was behind a door. A struggle with Brinson ensued. Altogether, the defendant fired three shots, killing Mr. Brinson. Defendant's written statement indicates that after defendant broke the motel room window, Brinson reached out and pulled him through the window. When Brinson grabbed him, defendant wrote, he (defendant) pulled a gun out of his pants and began shooting.

Although the evidence concerning the events immediately preceding the killing conflicted, we believe the trial judge had sufficient evidence to determine by a preponderance of the evidence that the defendant premeditated and deliberated the killing. The totality of the circumstances, when combined with the specific evidence of defendant's forewarning to Ms. Jackson to get out of the line of fire, permit this conclusion. When a defendant is found guilty of murder in the second degree, a determination by the preponderance of the evidence in the sentencing phase that he premeditated and deliberated the killing is reasonably related to the purposes of sentencing and may be considered in sentencing. *State v. Melton*, 307 N.C. 370, 376-78, 298 S.E. 2d 673, 678-79 (1983). See also *State v. Gaynor*, 61 N.C. App. 128, 130-32, 300 S.E. 2d 260, 262 (1983).

[2] Defendant next contends that the trial court erred in failing to find additional mitigating factors at the time of the sentencing. Specifically, defendant contends that the psychiatric evaluation and other evidence presented at the sentencing hearing would support finding the following: the defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense; and the defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise ex-

State v. Monroe

tenuating. We disagree and find that the trial court did not err in failing to find additional factors in mitigation.

A trial judge can properly reject any factor in aggravation or mitigation if he finds it to be either not reasonably related to the purposes of sentencing, not transactionally related to the offense, or not proven by a preponderance of the evidence. *State v. Teague*, 60 N.C. App. 755, 758, 300 S.E. 2d 7, 9 (1983). The additional factors in mitigation recommended by the defendant were not proven by a preponderance of the evidence.

The psychiatric evaluation report referred to by defendant states: "While in jail, Mr. Monroe became confused and apparently developed auditory hallucinations, leading to his referral here. . . . Because of auditory hallucinations, anti-psychotic medication was ordered." The auditory hallucinations were diagnosed as "secondary to isolation and stress of confinement" and were treated with anti-psychotic medications. Since the mental condition developed after defendant was arrested and jailed and was "secondary to isolation and stress of confinement," it could not have been a factor that reduced his culpability for the crime. The psychiatric opinion deals only with defendant's capability to stand trial and does not require a finding by the preponderance of the evidence that defendant was suffering from a mental condition at the time of the offense which would serve as a factor in mitigation.

Defendant's contention that the court should have found as a further mitigating factor that the defendant acted under strong provocation or the relationship between defendant and the victim was otherwise extenuating is also unsupported by the evidence. Defendant does not contend that he was provoked by a threat or challenge from the victim. Instead, defendant contends that his prior relationship with Ms. Jackson and his knowledge that she was staying with Mr. Brinson for a weekend are sufficient to prove provocation or an extenuating relationship with the victim. We disagree. The fact that defendant's actions resulted from jealousy over Brinson's relation with his former girl friend is not a proper factor for use in mitigating defendant's punishment. *State v. Puckett*, 66 N.C. App. 600, 606, 312 S.E. 2d 207, 211 (1984).

Finally, defendant contends that the trial court erred in finding that the factors in aggravation outweighed the factors in

State v. Jones

mitigation. In support of this contention, defendant refers to his arguments in support of deleting the aggravating factor and adding two mitigating factors. Having already rejected those arguments, we reject this contention without further comment.

The sentence imposed by the trial court is

Affirmed.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. LARRY JONES

No. 8316SC1055

(Filed 18 September 1984)

Criminal Law § 91— speedy trial—no excludable time periods—size of docket—no delay by State—improper criteria

The trial court erred in denying defendant's motion to dismiss pursuant to the Speedy Trial Act, G.S. 15A-701 *et seq.*, where more than 120 days elapsed between defendant's mistrial and defendant's motion for dismissal and the hearing thereon; the State did not offer any evidence as to any time periods to be excluded under G.S. 15A-701(b); and the size of the docket and whether the State acted in a wilful or neglectful manner were not criteria to apply in determining a motion to dismiss pursuant to the Speedy Trial Act.

APPEAL by defendant from *Herring, Judge*. Judgment entered 13 May 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 21 August 1984.

This is a criminal action in which defendant was convicted at a jury trial for manufacture of marijuana in violation of G.S. 90-95(a)(1).

Defendant was first tried at the 4 October 1982 criminal session of Superior Court of Robeson County. During presentation of evidence by the defendant, the Honorable Giles R. Clark, Judge, declared a mistrial on 8 October 1982.

On 25 March 1983 the defendant made a motion to dismiss for failure of the State to comply with G.S. 15A-701(a1)(4), the Speedy Trial Act. On that same date, the motion was denied. At

State v. Jones

that point 168 days had passed since the mistrial was declared on 8 October 1982.

The evidence at the hearing tended to show that, including dual sessions of court, there had been nineteen criminal sessions of Superior Court in Robeson County between 8 October 1982 and 25 March 1983, that the defendant and his witnesses had been in court during all those same sessions and that there were no allowable exclusions of time pursuant to G.S. 15A-701(b).

In denying defendant's motion to dismiss, the trial judge cited crowded docket conditions and the lack of wilfulness or negligence on the part of the State in failing to bring the case to trial within the time limits mandated by G.S. 15A-701(a1)(4).

Defendant was tried on 9 May 1983 and from his conviction and the denial of his motion to dismiss for speedy trial violations, he appeals.

Attorney General Edmisten by Associate Attorney General Thomas H. Davis, for the State.

Britt and Britt, by William S. Britt, for the defendant-appellant.

EAGLES, Judge.

Defendant assigns as error the trial court's denial of his motion to dismiss pursuant to North Carolina's Speedy Trial Act, G.S. 15A-701 *et seq.* For the reasons stated below, we agree that there was error.

We note that the Speedy Trial Act, G.S. 15A-701 *et seq.*, creates new rights, supplemental to the speedy trial rights existing under the Sixth Amendment of the United States Constitution. *State v. Reekes*, 59 N.C. App. 672, 297 S.E. 2d 763, *cert. denied*, 307 N.C. 472, 298 S.E. 2d 693 (1982). Thus, the terms of the statute control where a motion to dismiss is made pursuant to G.S. 15A-701 *et seq.* as distinguished from a motion to dismiss based on an alleged denial of constitutional rights to a speedy trial guaranteed by the Sixth Amendment of the United States Constitution. The defendant's motion here was made pursuant to our statute.

State v. Jones

The evidence introduced at the motion hearing on 25 March 1983 clearly shows that a prior trial was terminated by an order of mistrial entered on 8 October 1982.

G.S. 15A-701(a1)(4) mandates that when a defendant is to be re-tried following a mistrial, then he must be tried again within 120 days of the declaration of mistrial.

If a defendant is not brought to trial within the time limits required (here, the 120 day limit of G.S. 15A-701(a1)(4)), G.S. 15A-703 requires that the charge *shall* be dismissed on motion of the defendant. The statute imposes on a criminal defendant the burden of proof in supporting his motion to dismiss for failure of the State to comply with the time limits for trial specified by G.S. 15A-701(a1)(4). It gives the State, however, "the burden of going forward with evidence in connection with excluding periods from computation of time in determining whether or not the time limitations [of the Speedy Trial Act] have been complied with." *State v. Edwards*, 49 N.C. App. 426, 427, 271 S.E. 2d 533, 534 (1980), *appeal dismissed*, 301 N.C. 724, 276 S.E. 2d 289 (1981). Once the defendant shows that more than 120 days have passed since the order of mistrial, the State, in order to prevail, must show that no more than 120 days of *non-excludable time* has passed.

The defendant has clearly met his burden by showing that 168 days elapsed between the order of mistrial and the hearing upon the motion to dismiss.

By contrast, nothing in the record provides a basis for determining that the State has met its burden imposed by G.S. 15A-703 relating to excludable time periods. The State offered no evidence as to any time periods to be excluded under G.S. 15A-701(b). The defendant offered the evidence tending to show there were 19 criminal sessions of Superior Court in Robeson County between 8 October 1982 and 25 March 1983. No evidence was offered by the State as to why this case could not reasonably have been tried at one of those sessions.

The trial court, however, seems to have relied on the "size of the docket in [Robeson] County" and that the "State did not act in a [wilful and neglectful manner]" in failing to bring the case to trial within the time limit imposed by the Speedy Trial Act. This is not an appropriate standard for concluding that G.S. 15A-

State v. Jones

701(a1)(4) has been complied with or that noncompliance may be overlooked.

Our court held in *State v. Edwards, supra*, that “[t]he mere taking of judicial notice of the number of court sessions held in the county of venue . . . was not sufficient to support exclusion from computation under the Speedy Trial Act of any specific ‘period of delay’ [pursuant to G.S. 15A-701(b)(8)]. Some factual basis in the record for a determination that the case could not reasonably have been tried during the scheduled sessions was also required.” 49 N.C. App. at 429, 271 S.E. 2d at 535. This same standard must apply to the mere taking of judicial notice of the size of the docket. Since no factual basis appears in the record upon which the trial judge could have taken notice of the size of the docket, it was error to do so.

The trial judge also took notice that the State had not acted in a wilful or neglectful manner. Under the Speedy Trial Act, the absence of wilfulness or negligence is not a criterion for excluding time periods pursuant to G.S. 15A-701(b). It was error to apply this standard to a determination of a motion to dismiss pursuant to the Speedy Trial Act.

The judgment entered against the defendant must be vacated and the case remanded to Superior Court of Robeson County for entry of an order granting defendant’s motion to dismiss for failure to comply with the Speedy Trial Act. The trial court should also consider G.S. 15A-703 in determining whether the order of dismissal should be entered with or without prejudice. Defendant’s other assignments of error need not be considered.

Vacated and remanded.

Judges ARNOLD and WHICHARD concur.

Holcomb v. Holcomb

KENYOON B. HOLCOMB II v. PAMELA GARRIS HOLCOMB

No. 8323DC1189

(Filed 18 September 1984)

Contribution § 1— joint obligors on judgment— judgment paid by one— failure to make notation on judgment— equitable contribution available

Where a judgment was obtained against both plaintiff and defendant, plaintiff paid the judgment in full, and plaintiff then sought contribution from defendant for one-half the total amount paid to satisfy the judgment, there was no merit to defendant's contention that, because plaintiff failed to enter a notation on the judgment docket as required by G.S. 1B-7, he failed to preserve the right to seek contribution from joint obligors, since the purpose of the statute was to change the common law so as to provide a summary procedure for contribution on the basis of the original judgment debt, but it in no way eliminated plaintiff's right to seek equitable contribution.

APPEAL by plaintiff from *Osborne, Judge*. Judgment entered 26 August 1983 in District Court, WILKES County. Heard in the Court of Appeals 30 August 1984.

Plaintiff instituted this action to recover the sum of four thousand seven hundred twenty-seven and 16/100 dollars (\$4,727.16), plus interest, from defendant. Plaintiff alleges that a judgment was obtained against both plaintiff and defendant for nine thousand four hundred fifty-four and 33/100 dollars (\$9,454.33) in the action *R. V. Garris v. Kenyoon B. Holcomb II and Pamela Garris Holcomb*, 77CVD1109, District Court Division, Wilkes County General Court of Justice. Plaintiff paid the judgment in full and now seeks contribution from defendant for one-half (1/2) the total amount paid to satisfy the judgment.

Defendant denied that plaintiff is entitled to contribution and made a motion for summary judgment. Plaintiff appeals from the order granting defendant's motion for summary judgment.

Ferree, Cunningham & Gray, by George G. Cunningham, for plaintiff appellant.

Porter, Conner and Winslow, by Kurt R. Conner, for defendant appellee.

Holcomb v. Holcomb

ARNOLD, Judge.

Plaintiff assigns error to the order granting summary judgment for the defendant and dismissing the action. Plaintiff argues that he paid more than his just share of the common judgment imposed on plaintiff and defendant and is therefore entitled to relief through the doctrine of equitable contribution. Defendant argues that because the plaintiff failed to enter a notation on the judgment docket, as required by G.S. 1B-7, he has not preserved the right to seek contribution from joint obligors. We find that plaintiff's failure to make the statutorily-required notation only prevents him from seeking enforcement under the statute; it does not eliminate his cause of action for equitable contribution. Summary judgment was accordingly improper.

Section 1B-7 provides in part:

(a) In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his pro rata share thereof, if one or more of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the full amount due on said judgment, and shall have entered on the judgment docket in the manner hereinafter set out a notation of the preservation of the right of contribution, such notation shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his pro rata share thereof to the extent of his liability thereunder in law and equity. Such judgment may be enforced by execution or otherwise in behalf of the judgment debtor or debtors who have so preserved the judgment.

G.S. 1B-7 sets out a process for summary disposition of the plaintiff's claim for contribution against the defendant. This process originated in prior versions of G.S. 1B-7, G.S. 1-240 (1943) and C.S. 618 (1919). Both of these statutes provided that a person who paid all or part of a judgment could keep alive the judgment as against joint obligors by requesting that the judgment creditor create a trust for safekeeping of the payment. G.S. 1B-7 retains

Holcomb v. Holcomb

the process of preserving the judgment as against the joint obligors, but allows the judgment debtor to preserve the judgment by the simple method of making a notation on the judgment docket.

The purpose of statutes allowing a judgment debtor "to preserve" the judgment as against joint obligors was to change the common law so as to provide a summary procedure for contribution on the basis of the original judgment debt. It was a settled principle of the common law that payment of the judgment debt by one or more of those jointly or severally liable on the judgment extinguished the judgment as to the other debtors. *Hoft v. Mohn*, 215 N.C. 397, 2 S.E. 2d 23 (1939). The contribution statutes were designed to keep alive the judgment, and to allow the judgment debtor who had paid the judgment to enforce it in summary proceedings against joint debtors who had not paid their fair share. The contribution statutes created a new right, unknown in the common law, and substantial compliance with the statutory terms was necessary to make it available. *Hoft*, 215 N.C. at 399, 2 S.E. 2d at 25. This right to preserve the judgment (or the judgment lien) was retained in G.S. 1B-7.

Further, the contribution statutes preceding G.S. 1B-7 were also intended to create another new right: they made it possible for joint tortfeasors to seek contribution. Prior to the passage of these statutes, the common law forbade persons in *pari delicto* from suing for contribution. See *Lineberger v. City of Gastonia*, 196 N.C. 445, 450, 146 S.E. 79, 82 (1929), citing *Raulf v. Elizabeth City Electric Light and Power Co.*, 176 N.C. 691, 97 S.E. 236 (1918). The General Assembly, apparently because it was making a major change in the common law, passed detailed provisions relating to how joint tortfeasors could sue for contribution. G.S. 1-240 (1943); C.S. 618 (1919). When G.S. 1-240 was amended, the sections relating to joint tortfeasors were separated from that concerned with preserving the judgment, and were expanded. See G.S. 1B-(1)-(6) (1983). The provisions that concern joint tortfeasors, then, were added to create a right of contribution not conferred by the common law, and not to destroy by implication common law rights already in existence. At no point did any prior version of the contribution statute, nor does the modern version, expressly or impliedly eliminate the equitable contribution action. Rather, equitable contribution has continued as an independent action,

Chamberlin v. Chamberlin

separate from the summary proceedings set out in statute for preserving the judgment. *See generally* 18 C.J.S. Contribution § 13(a).

We are unconvinced that anything on the face of G.S. 1B-7, or in its history, indicates that the General Assembly intended to eliminate the plaintiff's right to seek equitable contribution. The court's order granting summary judgment is

Reversed.

Judges WHICHARD and EAGLES concur.

THOMAS H. CHAMBERLIN v. NANCY ANN SHIPMAN CHAMBERLIN

No. 838DC1069

(Filed 18 September 1984)

Divorce and Alimony § 1.1— jurisdiction—residency requirement

The requirement of N. C. law that one of the parties to a divorce action based on one year's separation be a resident of this State for six months next preceding the filing of the divorce action is jurisdictional and confers the necessary subject matter jurisdiction for the trial court to proceed *in rem* under G.S. 1-75.8(3), and since the jurisdictional residency requirement was clearly met in this case, the trial court correctly concluded as a matter of law pursuant to that statute that it could proceed to adjudicate the dissolution of the marriage between plaintiff, a resident of N. C., and defendant, a resident of Pennsylvania.

APPEAL by defendant from *Goodman, Judge*. Judgment entered 3 August 1983 in District Court, LENOIR County. Heard in the Court of Appeals 21 August 1984.

This is an action for divorce in which plaintiff, Thomas H. Chamberlin, seeks an absolute divorce from the defendant, Nancy Ann Shipman Chamberlin.

The essential facts are:

Plaintiff instituted this action on 9 May 1983 by filing a complaint alleging, *inter alia*, that he was a resident of North Carolina and had been so for a period of six months next preceding

Chamberlin v. Chamberlin

the filing of the action, that plaintiff and defendant were married on 5 June 1965, that they had been continuously separated since 8 May 1982 and that plaintiff was entitled to an absolute divorce based on one year's separation.

The summons and complaint were served upon the defendant at her place of residence in Pennsylvania pursuant to G.S. 1A-1, Rule 4(j)(1)(c).

Defendant filed a pre-answer motion to dismiss for lack of jurisdiction over her person pursuant to G.S. 1A-1, Rules 12(b)(2), 12(b)(4) and 12(b)(5). From a denial of her motion to dismiss, the defendant appeals.

White, Allen, Hooten, Hodges and Hines, by John C. Archie, for plaintiff-appellee.

Taylor, Warren, Kerr and Walker, by David E. Hollowell, for defendant-appellant.

EAGLES, Judge.

We note at the outset that an appeal lies immediately from refusal by the trial court to dismiss a cause for want of jurisdiction over the person where the motion is made pursuant to G.S. 1A-1, Rule 12(b)(2). *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982); G.S. 1-277(b). Defendant does not challenge the sufficiency of process or the manner of service in her brief and has thus waived argument concerning the trial court's denial of her motion to dismiss pursuant to G.S. 1A-1, Rules 12(b)(4) and 12(b)(5). Rule 28(b)(5), Rules of Appellate Procedure.

In the sole remaining assignment of error, defendant asserts that the trial court erred in denying her motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(2). We hold that there was no error.

Defendant contends that the trial court does not have personal jurisdiction over her for the purpose of granting an absolute divorce based upon one year's separation as prayed for by the plaintiff. This contention is without merit.

An action for divorce is a statutory proceeding which differs substantially from any other type of proceeding . . . In some respects a divorce action is in the nature of an action *in*

Chamberlin v. Chamberlin

rem and in others *in personam*. When the action is limited solely to a dissolution of the marriage, it has been considered a proceeding *in rem*, the *res* upon which the judgment operates being the *status* of the parties. [Emphasis added.] 1 Lee, *North Carolina Family Law*, Section 41 (4th Ed. 1979).

G.S. 1-75.8 states, in pertinent part: "A court of this State having jurisdiction over the subject matter may exercise jurisdiction *in rem* . . . (3) [w]hen the action is for a divorce or annulment of a resident of this State."

Our law requires that one of the parties to a divorce action based upon one year's separation be a resident of this State for six months next preceding the filing of the divorce action. This residency requirement is jurisdictional and confers the necessary subject matter jurisdiction for the trial court to proceed *in rem* under G.S. 1-75.8(3). See, *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975). Since this jurisdictional residency requirement was clearly met in the instant case, the trial court correctly concluded as a matter of law pursuant to G.S. 1-75.8(3) that it could proceed.

While the due process mandates of fairness apply with equal force to actions *in rem* and *quasi in rem* as well as to actions *in personam*, *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E. 2d 868 (1980), it is also clear that the General Assembly in enacting G.S. 1-75.8(3) intended to confer on the North Carolina courts the full jurisdictional powers permissible under federal due process as they relate to *in rem* and *quasi in rem* jurisdiction for divorce and annulment proceedings of North Carolina residents. See, *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977) (holding similarly for G.S. 1-75.4, the State's "Long Arm Statute").

In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the United States Supreme Court held the "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), applicable to all actions whether *in personam*, *in rem* or *quasi in rem*. However, the *Shaffer* court also stated: "It appears, therefore, that jurisdiction over many types of actions which are now or might be brought *in rem* would not be affected by a holding that any assertion of state court jurisdiction must satisfy the *International Shoe* standard." 433 U.S. at 208.

State v. Bates

In a footnote, the *Shaffer* court continued: "We do not suggest that jurisdictional doctrines other than those discussed in . . . [the text of the opinion], such as rules governing adjudications of status, are inconsistent with the standard of fairness." 433 U.S. at 208 n. 30.

G.S. 1-75.8(3) governs *in rem* and *quasi in rem* jurisdiction over the marriage status of residents of this State. G.S. 1-75.8(3) is a necessary means to accomplish the compelling interest of North Carolina courts in adjudicating the status of North Carolina residents. Given the State's compelling interest in determining the status of its residents, balanced against defendant's arguments of lack of "minimum contacts," we cannot say that G.S. 1-75.8(3) is inconsistent with the standard of due process fairness announced in *Shaffer v. Heitner*, *supra*.

For these reasons, we hold that the District Court of Lenoir County has jurisdiction pursuant to G.S. 1-75.8(3) to adjudicate the dissolution of the marriage between plaintiff, a resident of this State, and defendant, a resident of the State of Pennsylvania.

Defendant's other assignments of error are without merit.

The judgment of the trial court is affirmed.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. BOBBY BATES

No. 8322SC1225

(Filed 18 September 1984)

1. Robbery § 4.2— intent to deprive owner of property—sufficiency of evidence

In a prosecution for common law robbery, there was no merit to defendant's contention that the evidence failed to reveal the requisite felonious intent at the time the taking occurred to deprive the owner permanently of his property, since the evidence showed that defendant and his father became involved in an argument with the victim who went into his house to get a rifle; defendant and his father followed the victim; defendant knocked the rifle out of the victim's hands and began beating him around the head with a spindle; defendant's father then picked up the rifle; and defendant and his father left with the rifle and did not return it.

State v. Bates

2. Robbery § 1; Trespass § 12— common law robbery—forcible trespass not lesser offense

Forcible trespass to real property under G.S. 14-126 is not a lesser included offense of common law robbery, and the trial court did not err in denying defendant's request for an instruction thereon.

3. Criminal Law § 123— order of charges on verdict form—no prejudice

Defendant was not prejudiced by the order of the charges on the verdict form where the form began with the most serious charge and listed alternative verdicts in descending order of severity.

APPEAL by defendant from *Morgan, Judge*. Judgment entered 14 July 1983 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 23 August 1984.

Defendant appeals from a judgment of imprisonment entered upon his conviction for common law robbery.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Klass, Lohr, Philpott & Curry, by Philip B. Lohr, for defendant appellant.

WHICHARD, Judge.

The State's evidence tended to show that defendant and his father, a codefendant, drove to the house of the victim to discuss personal grievances. An argument ensued, and the victim retreated into his house to get a rifle. Defendant and his father followed the victim into the house. Defendant knocked the rifle out of the victim's hands and began beating him around the head with a spindle. Defendant's father then picked up the rifle. Defendant and his father left with the rifle and did not return it.

[1] Defendant contends the court erred in denying his motions to dismiss and to set aside the verdict as against the greater weight of the evidence. He argues that the evidence fails to reveal the requisite felonious intent at the time the taking occurred to deprive the owner permanently of his property, citing *State v. Richardson*, 308 N.C. 470, 474, 302 S.E. 2d 799, 802 (1983), where the Court stated: "It is well settled law that the defendant must have intended to permanently deprive the owner of his property at the time the taking occurred to be guilty of the offense of robbery." (Emphasis in original; citations omitted.)

State v. Bates

No direct evidence established defendant's intent at the time of the taking to deprive the victim of his rifle permanently, and it is reasonable to infer that defendant did not have such intent at that time. However, "[i]ntent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E. 2d 506, 508 (1974). The evidence showed that defendant and his father took the rifle by force, departed from the victim's premises with it in their possession, and never returned it. In passing on defendant's motions the court had to consider this evidence in the light most favorable to the State, giving the State the benefit of *every* reasonable inference to be drawn therefrom. *Bell, supra*. So considered, this evidence permitted, but did not compel, the reasonable inference that defendant and his father intended at the time of the taking to deprive the victim of his rifle permanently. "It was for the jury to determine, under all the circumstances, defendant's ulterior criminal intent." *Id.* The court thus properly denied defendant's motions.

[2] Defendant contends the court erred in denying his motion "to submit the offense of forcible trespass (N.C.G.S. 14-126) to the jury." It appears from the narration of the trial proceedings in the record that defendant requested an instruction on forcible trespass to real property under G.S. 14-126 as a lesser included offense of common law robbery.

A lesser included offense must contain some of the elements of the greater offense, but cannot contain an element different from the greater offense. *State v. Weaver*, 306 N.C. 629, 635, 295 S.E. 2d 375, 379 (1982). Common law robbery is "'the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation.'" *State v. Lundsford*, 229 N.C. 229, 231, 49 S.E. 2d 410, 412 (1948). G.S. 14-126, the statute on forcible trespass to real property, contains the different element of "entry into . . . lands and tenements." The statutory offense of forcible trespass to real property therefore cannot be a lesser included offense of common law robbery. Similarly, common law forcible trespass to real property by definition requires an unlawful invasion of or threat to premises possessed by another, and thus involves an element separate and distinct from those of common law robbery. *See, e.g., State v. Ward*, 46 N.C. 290 (1854); *see*

McDaniel v. N. C. Mutual Life Ins. Co.

generally Sharpe, Forcible Trespass to Real Property, 39 N.C.L. Rev. 121 (1961). The court thus properly declined to instruct on forcible trespass under G.S. 14-126.

Arguably, the court should have instructed on the common law misdemeanor of forcible trespass to personal property as a lesser included offense of common law robbery. *See, e.g., State v. Sowls*, 61 N.C. 151 (1867); *State v. Pearman*, 61 N.C. 371 (1867). *See generally Sharpe, Forcible Trespass to Personal Property*, 40 N.C.L. Rev. 252 (1962). Defendant's request for instructions appears, however, to have related only to the statutory offense of forcible trespass to real property established by G.S. 14-126. He did not request an instruction on forcible trespass to personalty or object to the failure to instruct thereon. He thus is precluded from assigning that omission as error. N.C. R. App. P. 10(b)(2).

[3] Defendant contends he was prejudiced by the order of the charges on the verdict form. The form began with the most serious charge and listed alternative verdicts in descending order of severity, contrary to defendant's request that the possible verdicts be listed in the opposite order. Defendant cites no authority in support of this contention and we know of none. This Court has previously rejected a similar argument. *See State v. Wall*, 9 N.C. App. 22, 24, 175 S.E. 2d 310, 311 (1970).

No error.

Judges ARNOLD and EAGLES concur.

OTIS L. McDANIEL, SR., AND WIFE, ROMANIA McDANIEL v. NORTH
CAROLINA MUTUAL LIFE INSURANCE COMPANY

No. 8318DC1067

(Filed 18 September 1984)

1. Insurance § 41— medical insurance policy—inception of sickness—expenses covered by policy

In an action to recover medical expenses under a policy issued by defendant where defendant claimed that a preexisting sickness exclusion barred recovery, defendant was not entitled to judgment on the pleadings or judgment n.o.v. where the evidence tended to show that plaintiff wife experienced

McDaniel v. N. C. Mutual Life Ins. Co.

leg pain in June prior to issuance of the policy in July; she was able to perform her usual occupation as a nursing assistant and her pains did not preclude or significantly interfere with her usual functions and activities until her surgery in October; and for purposes of determining insurance coverage, plaintiff wife did not contract her "sickness" until after the policy became effective.

2. Attorneys § 7.5— insurer's unwarranted refusal to pay—award of attorney's fee proper

In an action to recover medical expenses under a policy issued by defendant where defendant claimed that a preexisting sickness exclusion barred recovery, the trial court did not err in awarding plaintiffs an attorney fee pursuant to G.S. 6-21.1, and the effect of this ruling was not negated by the fact that the court labeled its finding that defendant made an unwarranted refusal to pay a conclusion of law.

APPEAL by defendant from *Lowe, Judge*. Judgment entered 15 July 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 21 August 1984.

Plaintiffs sued to recover medical expenses under the terms of a medical insurance policy issued by defendant. Defendant defended on the ground that a preexisting sickness exclusion barred recovery. The jury returned a verdict for plaintiffs. The court entered judgment thereon and awarded attorney fees to plaintiffs pursuant to G.S. 6-21.1.

Defendant appeals.

Timothy G. Warner for plaintiff appellees.

Albert L. Willis for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court should have granted its motion for judgment on the pleadings because the complaint revealed that plaintiff-wife experienced symptoms of her "sickness" before the policy was issued. Plaintiffs' complaint alleged that plaintiff-wife experienced leg pains in June 1981, and that the problem which ultimately led to her hospitalization for exploratory surgery on 8 October 1981 caused these pains. Defendant issued its medical insurance policy to plaintiffs on 12 July 1981. The policy covered "sickness contracted while this policy is in force."

McDaniel v. N. C. Mutual Life Ins. Co.

Our Supreme Court has accepted the following definition for determining when sickness arises for purposes of insurance coverage:

While the words "sickness" and "disease" are technically synonymous, "when given the popular meaning as required in construing a contract of insurance, 'sickness' is a condition interfering with one's usual activities, whereas disease may exist without such result; in other words, one is not ordinarily considered sick who performs his usual occupation, though some organ of the body may be affected, but is regarded as sick when such diseased condition has advanced far enough to incapacitate him." 29A Am. Jur., *Insurance* § 1154; 10 Couch on Insurance 2d § 41:801.

Price v. State Capital Life Ins. Co., 261 N.C. 152, 155, 134 S.E. 2d 171, 173 (1964). See also 10A Couch on Insurance 2d (Rev. ed.) Sec. 41A:73; Annot., 94 A.L.R. 3d 990. Plaintiffs' complaint contains no allegations indicating that plaintiff-wife was not performing her usual occupation and other usual activities, or that she was in any way incapacitated by her pains, prior to her 8 October 1981 hospitalization. Her mere undiagnosed symptom of pain prior to issuance of the policy was not a "sickness" at that time within the definition of that term accepted by our Supreme Court in construing contracts of insurance. The court thus properly denied defendant's motion for judgment on the pleadings.

Defendant also contends the court erred in denying its motion for judgment notwithstanding the verdict. Evidence at trial showed that plaintiff-wife was able to perform her usual occupation as a nursing assistant, and that her pains did not preclude or significantly interfere with her usual functions and activities until her 8 October 1981 surgery. Under the definition of "sickness" accepted in *Price, supra*, plaintiff-wife therefore did not contract her "sickness," for purposes of determining insurance coverage, until after the policy became effective. The court thus properly denied the motion for judgment notwithstanding the verdict.

Defendant contends the court erred in overruling his objections to statements of law contained in the argument to the jury by plaintiffs' attorney. The portions of the argument to which defendant objected are not set forth in the record. Moreover, the court instructed the jury that it would "take the law from the

McDaniel v. N. C. Mutual Life Ins. Co.

court and not from the attorneys." In these circumstances defendant has failed to show prejudice from the argument.

[2] Defendant finally contends the court erred in awarding plaintiffs an attorney fee pursuant to G.S. 6-21.1, which provides:

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is five thousand dollars (\$5,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

Our Supreme Court has stated:

The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E. 2d 40, 42 (1973) (citations omitted). Allowance of counsel fees under the authority of this statute is, by its express language, in the discretion of the presiding judge, and is reversible only for abuse of discretion. *Callicutt v. Hawkins*, 11 N.C. App. 546, 548, 181 S.E. 2d 725, 727 (1971).

The court found that undisputed facts tended to establish that plaintiff-wife was not incapacitated and that her condition was not diagnosed until after defendant's policy became effective.

Fireman's Fund Ins. Co. v. Williams Oil Co.

It further found that defendant did not request a jury instruction inconsistent with the one given, which it stated was largely based on the definition of "sickness" in *Price, supra*. It then concluded that defendant's refusal to pay plaintiffs' claim was unwarranted, justifying an award of an attorney fee to plaintiffs. In light of the trial court's findings and the Supreme Court's directive to construe the statute liberally, we are unwilling to find an abuse of discretion in the award.

Defendant notes that there was no *finding* that it made an unwarranted refusal to pay. It cites *U.S. Piping, Inc. v. The Travelers Indemnity Co.*, 9 N.C. App. 561, 564, 176 S.E. 2d 835, 837 (1970), for the proposition that lack of the statutorily required finding negates the effect of the discretionary ruling. It is clear, however, that the trial court made such a finding, though it was labeled a conclusion of law. This Court has held that a conclusion of law incorrectly denominated a finding of fact can nonetheless support a judgment. *Cantrell v. Liberty Life Ins. Co.*, 68 N.C. App. 651, 653, 315 S.E. 2d 544, 546 (1984). *See also Hodges v. Hodges*, 257 N.C. 774, 780, 127 S.E. 2d 567, 571-72 (1962). By the same reasoning, a finding of fact incorrectly denominated a conclusion of law should be equally valid. Thus, the court's conclusion that there was an unwarranted refusal by defendant to pay plaintiffs' claim satisfies the requirements of G.S. 6-21.1. To hold otherwise would elevate form over substance.

No error.

Judges ARNOLD and EAGLES concur.

FIREMAN'S FUND INSURANCE COMPANIES v. A. T. WILLIAMS OIL COMPANY AND WILCO TRANSPORT, INC.

No. 8321SC1104

(Filed 18 September 1984)

Insurance § 123— additional premium charged—method of calculation—no notice to insured

In an action to recover premiums allegedly due for the third year of insurance coverage provided to defendants, defendants had a right to rely on the

Fireman's Fund Ins. Co. v. Williams Oil Co.

assumption that their renewal policy with plaintiff would be based upon the same terms and conditions as the policies of the first two years, and plaintiff's conduct in first giving defendants notice of a change from a payroll classification to a sales receipts classification by way of a premium adjustment statement which was sent six months after the policy expired estopped plaintiff from asserting any claim to additional premiums.

APPEAL by plaintiff from *Mills, Judge*. Judgment entered 8 June 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 August 1984.

Plaintiff insurance company brought suit to recover premiums allegedly due for the third year of insurance coverage provided to defendants. Plaintiff first insured the retail and wholesale gas and fuel operations of defendant for a term of one year, 1 December 1977 to 1 December 1978. The policy was then renewed for each of the next two years, 1 December 1978 to 1 December 1979, and 1 December 1979 to 1 December 1980.

In each of the three years defendant paid an estimated premium at the beginning of the year. An audit at the end of the year would produce an adjusted premium. In the first two policy years, the adjusted premiums were approximately \$8,000 higher than the estimated premiums. The adjusted premium for the third policy year resulted in an increase of \$73,060 over the estimated \$31,842 premium.

The dramatic increase in the amount of the premium resulted from a change in the method of calculating premiums. Plaintiff used two classifications, one based on payroll and the other based on sales receipts. In the first two policy years, plaintiff applied only the payroll classification to defendants. In the third policy year, plaintiff also used the sales receipts classification in calculating defendants' premiums. Defendants were not made aware of the addition of the receipts classification until notice of the \$73,060 adjusted premium arrived. Except for the change in the method of calculation the renewal policies did not vary in their terms.

At trial, the judge granted defendants' motion for a directed verdict at the close of plaintiff's evidence. From the granting of this motion, plaintiff appeals.

Fireman's Fund Ins. Co. v. Williams Oil Co.

Wilson and Small, by Christopher J. Small, for plaintiff appellant.

Bell, Davis and Pitt, by William K. Davis, for defendant appellees.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in granting defendants' motion for directed verdict. We disagree and affirm the court's order.

Upon a motion for directed verdict made at the conclusion of the plaintiff's evidence, the court must determine whether the evidence, taken in the light most favorable to the plaintiff and giving it the benefit of every reasonable inference that can be drawn therefrom, is sufficient to withstand the motion. *Sawyer v. Shackelford*, 8 N.C. App. 631, 175 S.E. 2d 305 (1970). Plaintiff claims that defendants supplied the figures used for the estimated premiums and that the classification was identified on the policy itself as being based on sales receipts rather than payroll. This evidence, plaintiff claims, is sufficient to withstand defendants' motion for directed verdict. We conclude, however, that the motion was properly allowed.

Plaintiff admitted on discovery that the first notice to defendants of the change in defendants' renewal policy from a payroll classification to a sales receipts classification came by way of the premium adjustment statement which was sent in June of 1981, six months after the policy expired. The change to a receipts classification had never been discussed by the parties. We find that the fact that the receipts classification number appeared on the premium adjustment statement and was identified as "receipts" does not constitute notice of the classification change to defendants. Something more was needed, such as a cover letter or a description of the change on a separate piece of paper. See *Government Employees Ins. Co. v. United States*, 400 F. 2d 172, 175 (10th Cir. 1968).

Moreover, plaintiff's assertion that defendants supplied the figures used to estimate the premiums does not show that they had notice of the classification change. The evidence indicates

State v. Howard

that the figures supplied by defendants were intended to represent payroll information rather than sales receipts information.

We find that defendants had a right to rely on the assumption that their renewal policy with plaintiff would be based upon the same terms and conditions as the policies of the first two years. Plaintiff's conduct in failing properly to notify defendants of the classification change, therefore, acts to estop it from asserting any claim to additional premiums. *Gaston-Lincoln Transit, Inc. v. Maryland Casualty Co.*, 20 N.C. App. 215, 201 S.E. 2d 216 (1973), *aff'd*, 285 N.C. 541, 206 S.E. 2d 155 (1974).

At the close of plaintiff's case, the evidence was undisputed that defendants were not properly notified of the policy change. Where only one inference may be drawn from undisputed facts, the question of estoppel is one of law for the court, and the court may direct a verdict upon the issue. *Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669 (1953). We hold that the trial court properly directed the verdict in favor of defendants.

Affirmed.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. WESLEY JAY HOWARD

No. 8310SC1196

(Filed 18 September 1984)

Criminal Law § 148— new trial ordered—interlocutory order—no appeal by defendant

The trial court's order setting aside the verdict, vacating the judgment and ordering a new trial on the ground that the verdict was contrary to the weight of the evidence was interlocutory and affected no substantial right so that defendant's appeal therefrom must be dismissed.

APPEAL by defendant from *Barefoot, Judge*. Order entered 26 August 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 28 August 1984.

State v. Howard

Defendant struck and killed a bicyclist while driving on Interstate 40. A jury found him guilty of misdemeanor death by vehicle, G.S. 20-141.4, and the court entered judgment against him.

Defendant then filed a motion for appropriate relief pursuant to G.S. 15A-1414 on the grounds that (1) the State's evidence was insufficient to justify submission of the case to the jury, and (2) the verdict was contrary to the weight of the evidence. The trial court concluded that there was sufficient evidence to justify submission of the case to the jury, and it thus denied the motion to dismiss for insufficiency of the evidence. It set aside the verdict, vacated the judgment, and ordered a new trial, however, on the ground that the verdict was contrary to the weight of the evidence.

Defendant appeals from the portion of the order denying his motion for relief on the ground of insufficiency of the evidence to justify submission to the jury.

Attorney General Edmisten, by Assistant Attorneys General Walter M. Smith and Francis W. Crawley, for the State.

Tharrington, Smith & Hargrove, by Wade M. Smith, Roger W. Smith, and Douglas E. Kingsbery, for defendant appellant.

WHICHARD, Judge.

[I]n this State, no appeal in ordinary form lies in a criminal prosecution except from a judgment on conviction or on plea of guilt duly entered. (Citation omitted.) It would lead to interminable delay and render the enforcement of the criminal law well-nigh impossible if an appeal were allowed from every interlocutory order . . . in the course of a criminal prosecution, or from any order except one in its nature final. Accordingly, it has been uniformly held with us . . . that an ordinary statutory appeal will not be entertained except from a judgment on conviction or some judgment in its nature final.

State v. Webb, 155 N.C. 426, 430, 70 S.E. 1064, 1065-66 (1911). See also *State v. Pledger*, 257 N.C. 634, 638, 127 S.E. 2d 337, 340 (1962) ("A defendant is entitled to appeal only from a final judgment."); *State v. Inman*, 224 N.C. 531, 541, 31 S.E. 2d 641, 646

State v. Howard

(1944), *cert. denied*, 323 U.S. 805, 89 L.Ed. 642, 65 S.Ct. 563 (1945); *State v. Cox*, 215 N.C. 458, 2 S.E. 2d 370 (1939); *State v. Hiatt*, 211 N.C. 116, 117, 189 S.E. 124, 125 (1937) ("There was no judgment on conviction, or judgment prejudicial to the defendant in its nature final. The defendant therefore had no right to appeal . . ."); *State v. Blades*, 209 N.C. 56, 57, 182 S.E. 714, 714 (1935) ("The ruling . . . was an interlocutory judgment, and from this there was no right of appeal."); *State v. Rooks*, 207 N.C. 275, 176 S.E. 752 (1934); *State v. Black*, 7 N.C. App. 324, 328, 172 S.E. 2d 217, 220 (1970).

The Criminal Procedure Act, G.S. 15A-101 *et seq.*, did not alter the foregoing principle, which was established under statutes no longer in effect. In a case decided under that act, Judge (now Justice) Martin (Harry C.) stated: "Ordinarily in North Carolina an appeal will only lie from a final judgment. (Citations omitted.) In criminal cases, there is no appeal as a matter of right from an interlocutory order." *State v. Ward*, 46 N.C. App. 200, 203, 264 S.E. 2d 737, 739 (1980).

The statute governing review of trial court rulings on motions for appropriate relief provides: "The grant or denial of relief sought pursuant to G.S. 15A-1414 is subject to appellate review only in an appeal regularly taken." G.S. 15A-1422(b). The statute governing "regularly taken" criminal appeals provides: "A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right *when final judgment has been entered*." G.S. 15A-1444(a) (emphasis supplied).

These statutes, construed together, deny defendant the right to appeal at this juncture. Because the trial court set aside the verdict and vacated the judgment, defendant has not been convicted of any crime and no final judgment has been entered against him. He has been granted a new trial, at which he may secure acquittal or other disposition favorable to him. As the Supreme Court noted in *Cox, supra*, 215 N.C. at 459, 2 S.E. 2d at 371: "Mayhap the final judgment will be acceptable without appeal."

The ruling from which defendant appeals is interlocutory, no substantial right has been affected, and the appeal must be dismissed.

State v. Covel

Appeal dismissed.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. HORACE LEON COVEL

No. 832SC1125

(Filed 18 September 1984)

Criminal Law § 138.7— sentencing—aggravating factors—previous rape of victim—defendant on parole

In a rape and kidnapping case the trial court properly found as aggravating factors that defendant raped the victim in this case nine years earlier and that he committed these offenses while on parole, and the court could properly consider these factors in determining defendant's sentence, since they were reasonably related to the purposes of sentencing.

APPEAL by defendant from *Allsbrook, Judge*. Judgment entered 13 May 1983 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 21 August 1984.

Defendant was charged with first degree kidnapping in violation of G.S. 14-39 and first degree rape in violation of G.S. 14-27.2. As the result of a plea bargain under which it was agreed that the prison sentences imposed would run concurrently, defendant pled no contest to second degree kidnapping and second degree rape. The State's evidence tended to show that defendant was guilty of both charges and the court sentenced him to concurrent terms of fifteen years and thirty-five years respectively, whereas the presumptive term for second degree kidnapping is nine years and for second degree rape is fifteen years.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgett, for the State.

Stephen A. Graves for defendant appellant.

PHILLIPS, Judge.

The only question presented by this appeal that requires discussion is whether the prison sentences imposed violate the

State v. Covel

Fair Sentencing Act. We hold that they do not and affirm the judgment entered.

Preliminary to imposing sentence, the court found two factors in aggravation not specifically listed in G.S. 15A-1340.4(a)(1). One was that the defendant raped the victim of the rape and kidnapping in this case nine years earlier when she was sixteen years old, and the other was that the offenses involved were committed while defendant was on parole. The statute authorizes a sentencing judge to "consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein." The factual basis for both factors was established by evidence that was not contradicted. The ultimate question, therefore, is whether the factors so found are "reasonably related to the purposes of sentencing," two of which, under G.S. 15A-1340.3, are "to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability," and "to protect the public by restraining offenders."

One of the statutory factors in aggravation deemed by the General Assembly to be reasonably related to the purposes of sentencing is that the offense was committed while the defendant was on pretrial release from another felony charge. G.S. 15A-1340.4(a)(1)(k). That an offense was committed while on parole is equally related to the purpose of sentencing, it seems to us, since in each instance a continuing commitment to crime is indicated, which the public needs to be protected against. And that nine years earlier defendant had terrorized and violated the very same complaining witness in much the same manner greatly increased both the injury that defendant inflicted and his culpability. Again imposing himself on the girl, while holding a knife at her throat, after escaping prosecution the first time, also indicates a cruel and vicious disregard for consequences that the public needs protection against. Thus, it seems quite clear to us that both factors found by the court were "reasonably related to the purposes of sentencing."

France v. Winn-Dixie Supermarket

Affirmed.

Judges WEBB and JOHNSON concur.

HELEN SUSAN FRANCE v. WINN-DIXIE SUPERMARKET, INC.

No. 8317SC1185

(Filed 18 September 1984)

Negligence § 57.6— pickle juice on supermarket floor—no showing of negligence

In an action to recover for personal injuries sustained when plaintiff slipped and fell in a puddle of pickle juice in defendant's store, the trial court properly directed verdict for defendant where plaintiff made no attempt to show that defendant either created or knew of the slippery condition caused by the broken jar and puddle of juice.

APPEAL by plaintiff from *Long, James M., Judge*. Judgment entered 7 July 1983 in Superior Court, SURRY County. Heard in the Court of Appeals 30 August 1984.

Plaintiff sought damages for personal injuries sustained when she slipped and fell in a puddle of pickle juice in defendant's store. She appeals from a directed verdict for defendant.

Franklin Smith for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by G. Gray Wilson and Penni L. Pearson, for defendant appellee.

WHICHARD, Judge.

A store owner does not insure customers against slipping and falling. To hold the owner liable, plaintiff must show that defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 157 S.E. 2d 537 (1967).

Plaintiff here made no attempt to show that defendant either created or knew of the slippery condition caused by the broken pickle jar and puddle of juice on its floor. Instead, she presented evidence that another customer, who had been in the store fifteen

France v. Winn-Dixie Supermarket

or twenty minutes and was checking out when plaintiff entered, had seen the broken pickle jar on the floor before plaintiff fell. The customer did not say exactly when he observed the pickle jar. From this evidence the jury could only speculate as to how long the pickle juice had been on the floor and as to whether defendant had actual or constructive notice of the dangerous condition. Under these circumstances, a directed verdict for defendant was appropriate. *Hinson, supra*.

Our decision on the directed verdict issue renders discussion of plaintiff's other assignment of error unnecessary.

Affirmed.

Judges ARNOLD and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 SEPTEMBER 1984

BARRETT v. BARRETT No. 8420DC147	Union (83CVD1007)	Affirmed
BEEBEE v. KEMCO OF NC No. 8420SC158	Union (82CVS0457)	Dismissed
BODENHAMER v. TOWN OF KURE BEACH No. 835SC1203	New Hanover (83CVS1540)	Affirmed
BRENT v. FINNIGAN CORP. No. 8415SC161	Orange (83CVS258)	Affirmed
BRITT v. C. A. FLOYD & SONS No. 8416SC260	Robeson (82CVS00114)	Affirmed
BURLESON v. MITCHELL No. 8324SC1192	Watauga (82CVS171)	Reversed & Remanded
DAVIS v. TAYLOR No. 8415DC101	Orange (82CVD300)	Dismissed
GREEN v. SARJI No. 8418SC250	Guilford (82CVS6359)	Affirmed
GREENTREE ACCEPTANCE v. SELLERS ENT. No. 8410SC33	Wake (83CVS2565)	Affirmed
HAMBY v. CORRIHER FORD TRACTOR No. 8425SC209	Caldwell (81CVS1217)	Affirmed
HUNTLEY v. RUTHERFORD HOSPITAL No. 8410IC227	Industrial Commission (H-9642)	Affirmed
IN RE BAUCOM v. UNION CO. No. 8420SC193	Union (83CVS740)	Affirmed
KOUTROULAKIS v. KOUTROULAKIS No. 8426DC102	Mecklenburg (83CVD1412)	Appeal Dismissed
LUNDY v. WAKE CO. BD. OF EDUC. No. 8310DC622	Wake (82CVD1658)	Affirmed
McLEAN v. McDOUGALD No. 8411SC77	Harnett (82CVS0696)	No Error

SPEER v. SPEER No. 8424DC20	Watauga (82CVD337)	Affirmed
STATE v. ALLEN No. 8315SC1250	Orange (82CRS13373)	Remanded for Appropriate Sentencing
STATE v. AUTRY No. 8412SC162	Cumberland (83CRS12875)	No Error
STATE v. BROWN No. 8421SC254	Forsyth (83CRS31742) (83CRS31758) (83CRS31802) (83CRS31803) (83CRS31806) (83CRS29964)	No Error
STATE v. CAUTHEN No. 8427SC167	Lincoln (83CRS1576) (83CRS1577)	No Error
STATE v. COLEMAN No. 8415SC65	Alamance (82CRS20142)	Remanded for Resentencing
STATE v. COOK No. 8415SC108	Alamance (82CRS17140)	Judgment Arrested
STATE v. DAVIS No. 845SC255	New Hanover (82CRS23550) (82CRS23551)	No Error
STATE v. FOWLER No. 8415SC48	Alamance (83CR2630)	No Error
STATE v. GRAY No. 8417SC120	Surry (83CRS1485) (83CRS1486) (83CRS1487) (83CRS3101)	No Error
STATE v. HALL No. 844SC262	Onslow (83CRS5304)	No Error
STATE v. HARRIS No. 8422SC137	Iredell (82CRS13730)	No Error
STATE v. HOLBROOK No. 8417SC104	Surry (83CRS1412) (83CRS1413)	Affirmed
STATE v. JOHNSON No. 8326SC1087	Mecklenburg (82CRS40172)	No Error
STATE v. KELLEY No. 8413SC169	Bladen (83CRS1598)	No Error

STATE v. LOCKLEAR No. 8416SC217	Robeson (82CR14099) (82CR16057) (83CRS1571) (83CRS1573)	Affirmed
STATE v. McKINNEY No. 8418SC75	Guilford (83CRS36122)	No Error
STATE v. MILLER & BROWN No. 8423SC154	Ashe (83CRS1664) (83CRS1623)	No Error
STATE v. MILLS No. 843SC229	Carteret (83CR1965)	No Error
STATE v. MITCHELL No. 8328SC1054	Buncombe (83CRS6910) (83CRS6912) (83CRS6914) (83CRS6919) (83CRS6921) (83CRS7085) (83CRS7086)	No Error
STATE v. MOORE No. 8423SC221	Wilkes (83CRS4214)	No Error
STATE v. PALMER No. 8427SC248	Cleveland (83CRS298)	No Error
STATE v. PARKER No. 844SC265	Onslow (83CRS11514)	No Error
STATE v. RAIKORD No. 848SC211	Wayne (83CRS3105)	No Error
STATE v. SHIVER No. 848SC182	Lenoir (82CRS4064)	No Error
STATE v. SIMONS No. 8412SC327	Cumberland (82CRS12517)	No Error
STATE v. SMITH No. 848SC40	Wayne (82CRS16584)	No Error
STATE v. STALLINGS No. 844SC187	Duplin (82CRS3901)	No Error
STATE v. SWINSON No. 8410SC58	Wake (81CRS79116)	No Error
STATE v. TERRY No. 847SC71	Edgecombe (83CRS4792) (83CRS4796)	Affirmed

TROUTMAN v. TRAVENOL
LABORATORIES
No. 8329SC1176

McDowell
(83CVS37)

Affirmed

WILSON v. TRAYNHAM
No. 8422SC7

Davidson
(82CVS1060)

Affirmed

YOUNG v. SHEARIN
No. 8329SC1136

Transylvania
(81CVS355)

No Error

Marcoin, Inc. v. McDaniel

MARCOIN, INC. v. JOHN E. McDANIEL

No. 8328SC1142

(Filed 2 October 1984)

1. Fraud § 12.1— insufficient evidence of fraud

The evidence failed to show a false representation or concealment of any material fact by plaintiff's employee constituting fraud in the inducement of license agreements where the evidence showed that the only representation plaintiff's employee made was that the \$500 maximum monthly fee was subject to a cost-of-living increase every five years and that such representation was true; defendant admitted that he had read a paragraph of the license agreements clearly stating that a new fee schedule could be established every five years; and defendant presented no evidence that plaintiff's employee implied that because the agreements stated that the maximum fee was subject to change the rest of the fees were not.

2. Contracts §§ 12, 26.1— licensing agreements—fee provisions unambiguous—parol evidence properly excluded

The fee provisions of licensing agreements were not ambiguous as to what future changes could be made in the fee schedule, and the trial court thus properly invoked the parol evidence rule to exclude a "fact sheet" furnished to the licensee which discussed the licensing fees.

3. Contracts § 12— licensing agreements—construction of fee provisions

The trial court properly construed licensing agreements to permit a cost-of-living increase every five years for the fee schedule as well as for the maximum monthly fee.

4. Contracts § 23— waiver of breach

Defendant waived plaintiff's breach of a licensing agreement in failing to furnish defendant with a blanket fidelity bond by continuing to accept performance under the contract after plaintiff informed defendant that it could no longer furnish the bond.

5. Contracts § 17.2— termination of contract—liability for fees during notice

Defendant was liable to plaintiff for licensing fees for three months where the licensing agreement provided that the shortest notice a party could give of voluntary termination of the agreement was 90 days, and defendant thus owed license fees until the end of the 90-day period.

6. Damages § 11.2— breach of licensing agreement—no entitlement to punitive damages

The evidence showed only a fraudulent conveyance rather than a legal fraud, and plaintiff was thus not entitled to recover punitive damages for defendant's breach of a licensing agreement, where it established that the agreement required defendant to sell his client accounts to plaintiff upon termination of the agreements, that defendant sold his client accounts for far less than market value to a corporation whose stockholders were related to defend-

Marcoin, Inc. v. McDaniel

ant or were his close business associates, and that the accounts were sold during pendency of a suit wherein substantial damages were sought.

7. Damages § 11.1— punitive damages for breach of contract

Punitive damages are generally not allowable for a breach of contract unless the breach constitutes or is accompanied by an identifiable tort which contains some element of aggravation.

8. Trial § 3.2— denial of continuance—adequate time to prepare case

Defendant was not denied an adequate time to prepare his case by the trial court's denial of his motion to continue because only five days elapsed from the time defendant began discovery on amended issues until the trial where defendant had more than two months to prepare his case for trial but opted to wait until the disposition of certain motions, including a motion to dismiss the amended issues, before he commenced discovery.

9. Trial § 10.1— comments by trial judge—no expression of opinion

The trial judge did not express an opinion on the evidence in commenting to the attorneys, "I don't want you gentlemen to play games," or in stating, "I don't want any to the best of your knowledge."

APPEAL by defendant from *Lewis, Robert D., Judge*. Judgment entered 16 December 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 27 August 1984.

Plaintiff, a licensor of business financial management services, instituted this action against defendant, its Asheville territory licensee, on 11 December 1980. Claiming breach of contract, plaintiff sought to recover license fees for June through October 1980, as well as specific performance of a provision of the license agreements which required the defendant to sell all of his clients to the plaintiff. The defendant counterclaimed, alleging breach of contract and fraud in the inducement.

At trial during the 20 September 1982 civil term, it was discovered that subsequent to the commencement of this action, defendant had sold his client accounts to a corporation in which his wife and three children held four-sevenths of the stock. A former employee and two close business associates held the remainder of the stock. The court allowed plaintiff to file an amended complaint in which fraud was added to the existing allegations. A request for compensatory damages in the event specific performance was found to be impossible, and a request for punitive damages were added to the existing prayers for relief.

Marcoin, Inc. v. McDaniel

At the close of the evidence, the court directed a verdict in favor of plaintiff on its claim for license fees. The court directed verdicts against defendant on his counterclaims. The court reserved judgment on plaintiff's claim for specific performance, setting the trial of the amended issues for 6 December 1982.

On 24 November 1982 the court denied defendant's motions to dismiss plaintiff's claims under the amended complaint, for a mistrial and for a new jury to hear the amended issues. On 6 December 1982 the court denied defendant's pretrial motion for a continuance. Thereafter, trial was had and the jury returned a verdict in favor of plaintiff, finding that defendant had breached the contracts' provisions concerning sale of clients and that defendant had acted fraudulently in so doing. Plaintiff was awarded compensatory and punitive damages.

Roberts, Cogburn, McClure & Williams, by Max O. Cogburn and Isaac N. Northup, Jr., for plaintiff appellee.

Elmore & Powell, P.A., by Ronald W. Mack and John A. Powell, for defendant appellant.

VAUGHN, Chief Judge.

Defendant's first argument is that the court committed error in directing verdicts against defendant's counterclaims for fraud in the inducement and for breach of the license agreements. We address first the question of fraud in the inducement.

[1] In support of his claim of fraud, defendant presented the following evidence: In January 1975, defendant and his wife met with Mr. David Hinze, an employee of plaintiff corporation, to discuss the benefits and responsibilities of becoming plaintiff's licensee. Defendant was interested in becoming a licensee of two of plaintiff's services, Marcoin Management Services (MMS) and Busco Business Services (BUSCO). He had an opportunity to examine the blank license agreements for both services. Paragraph 11 of both agreements reads, in pertinent part:

This Agreement shall automatically be reopened every five (5) years for review by First Party [Plaintiff] and if covenants and undertakings assumed by Second Party in this Agreement are truly and faithfully being performed, the con-

Marcoin, Inc. v. McDaniel

tract will automatically be continued for a term of five (5) years on the same terms and conditions except that the prevailing fee schedule as established by First Party at the time of review shall apply for the next five (5) year term.

Paragraph 4 of these agreements reads, again in pertinent part:

4. FIRST PARTY'S FEES:

When Gross Billings Are At Least	But less Than	Monthly Base Fee Is	Plus This Percentage	On All Gross Billings Over
\$ -0-	\$1,500.00	\$ -0-	12%	\$ -0-
1,500.00	2,000.00	180.00	10%	1,500.00
2,000.00	2,500.00	230.00	8%	2,000.00
2,500.00	3,000.00	270.00	6%	2,500.00
3,000.00		300.00	4%	
and Over		*To Maximum of \$500.00		

*A maximum of \$500.00 monthly commission will be paid. Subject to the terms of paragraph 11, "Term of Agreement," where cost-of-living escalation can be a consideration.

Defendant was uncertain as to how paragraph 4 would be interpreted in light of paragraph 11. He expressed his uncertainty to Mr. Hinze. Defendant has presented no evidence showing what Mr. Hinze said as to how these paragraphs were to be interpreted. Mr. Hinze did, however, provide defendant with a "Fact Sheet" for MMS and BUSCO. The section of the BUSCO fact sheet which discussed fees read:

[R]ange is from 12% (less than \$1,000/month billing) to 4% (over \$3,000). Has maximum of \$500/month. Maximum is subject to cost-of-living adjustment every five years.

The MMS fact sheet said essentially the same thing.

After reading the fact sheets, defendant stated that he was satisfied as to how the contracts were to be interpreted. Defendant asked Mr. Hinze about the maximum fees. Mr. Hinze responded that the fact sheets accurately reflected the company's policy.

On 1 March 1975, defendant signed both the MMS and the BUSCO license agreements. On 29 February 1980, near the end of

Marcoin, Inc. v. McDaniel

the first five year term, defendant received a letter from plaintiff stating that effective April 1980, and in accordance with paragraph 11 of the license agreements, a new fee schedule for both MMS and BUSCO would apply. The new schedule provided for a \$100 base fee plus seven percent of client billings.

Defendant contends that when this evidence is considered in a light most favorable to him, it demonstrates a clear case of fraud. His argument is that Mr. Hinze led him to believe that the only item subject to modification every five years was the maximum fee and that the fee schedule itself would remain constant over the 25 year life of the contract.

To make out a case of actionable fraud, defendant must show that Mr. Hinze made a representation relating to some material past or existing fact; that the representation was false; that Mr. Hinze knew the representation was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion; that Mr. Hinze made the false representation with the intention that it should be relied upon by defendant; that defendant reasonably relied upon the representation and acted upon it; and that defendant suffered injury. *See, e.g., Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

The only representation that defendant shows Mr. Hinze made was that the \$500 maximum monthly fee was subject to a cost-of-living increase every five years. This representation was true, and thus cannot be the basis for an action in fraud. Nor can defendant argue that Mr. Hinze's statement served to conceal the plaintiff's right to modify the fee schedule. Paragraph 11 of the license agreements clearly states that a new fee schedule can be established every five years. Defendant admits that he read paragraph 11. Additionally, he presents no evidence that Mr. Hinze implied that because the contracts also stated that the maximum fee was subject to change the rest of the fees were not. Having truthfully and fully answered all questions asked of him by defendant, Mr. Hinze had no duty to initiate additional discussion as to the construction of clearly stated terms. Since no false representation was made and there was no concealment of any material fact, the trial court was correct in directing a verdict against defendant on the question of fraud.

Marcoin, Inc. v. McDaniel

We next consider whether it was appropriate to direct a verdict against defendant on his breach of contract counterclaim. Defendant contends the directed verdict was improper for four reasons. We will address these contentions serially.

[2] Defendant claims the MMS and BUSCO contracts are ambiguous because paragraphs 4 and 11 are unclear as to what future changes can be made in the fee schedules and that their construction should have been a question for the jury. Further, he maintains that it was error to invoke the parol evidence rule to exclude the fact sheets from consideration since they served to clarify and explain the unclear provisions.

We find no ambiguity in the language of the contracts' fee provisions. The provisions of paragraphs 4 and 11 are completely consistent with one another. Paragraph 11 establishes a 25 year contractual term which is subject to the substitution of a new fee schedule every five years. Paragraph 4 establishes the fee schedule for the first five year period. It also establishes a maximum monthly fee and, by way of clarification, notes that the maximum is not unalterable; it too is subject to change every five years. When a contested provision is not ambiguous its construction is a matter of law for the court. See *Lowe v. Jackson*, 263 N.C. 634, 140 S.E. 2d 1 (1965); *MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E. 2d 271 (1983). The trial court was therefore correct in removing the question of construction from the jury's consideration. Further, since the contracts were unambiguous, it was not error to invoke the parol evidence rule to exclude consideration of the fact sheets. See *Lineberry v. Lineberry*, 59 N.C. App. 204, 296 S.E. 2d 332 (1982).

[3] The defendant argues that if the contracts are not ambiguous, the court erred in its construction of them. The construction the defendant would have us accept is that the sentence in paragraph 4 which refers to increases in the monthly maximum fee defines what may be changed under the provisions of paragraph 11. Defendant contends that the proper construction of these contracts is that paragraph 4 allows only the *maximum* fees to be changed and that the fee schedules themselves may not be altered in any way during the 25 year term of the contract.

In urging that we accept such a construction, the defendant is, in effect, asking us to ignore two basic principles of contract

Marcoin, Inc. v. McDaniel

construction. The first is that a contract must be construed as a whole, considering each clause and word with reference to all other provisions and giving effect to each whenever possible. *State v. Corl*, 58 N.C. App. 107, 293 S.E. 2d 264 (1982); 4 S. Williston, *A Treatise On The Law of Contracts*, § 618(3) (3d ed. 1961). The second is that the common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to it. *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966), *modified on other grounds*, 277 N.C. 216, 176 S.E. 2d 751 (1970). 4 S. Williston, *supra*, § 618(1). Defendant's proposed construction would render meaningless much of paragraph 11 and would require that "fee schedule" be interpreted as meaning maximum fee. As defendant has provided no reason for us to believe that his strained construction is more reflective of the parties' intent than a more reasonable construction guided by traditional principles, we find his argument to be without merit.

Second, defendant contends that the trial court erred in holding that the new fee schedule did not constitute a material breach of the MMS and BUSCO contracts. This argument is premised on the assumption that the contracts would be given the construction defendant has urged. As the premise is incorrect, this argument must fail.

[4] Next, defendant contends that on the claim of breach of a third agreement, he presented sufficient evidence to withstand a motion for directed verdict. The evidence shows that on 1 March 1975 defendant entered into a license agreement with plaintiff in which defendant became the Asheville territory licensee of a small business ownership transfer service owned by plaintiff and known as Associated Bonded Escrow Company (ABECO). Paragraph 2(b) provides that the contract shall automatically continue for seven one-year periods after the initial three-year term, which was to begin 1 March 1975, unless terminated in writing by either party 90 days prior to the anniversary date of the contract. Paragraph 7(d) requires plaintiff to furnish defendant with a blanket fidelity bond. On 16 February 1978 plaintiff sent a letter to all ABECO licensees, informing them that their current bond coverage had been terminated due to changes in the insurance industry beyond plaintiff's control, and that they could acquire, after being

Marcoin, Inc. v. McDaniel

individually approved by plaintiff's carrier, a new individual bond for a \$25 monthly minimum and that the plaintiff would be willing to mutually terminate the license agreement if the licensee so desired. Defendant did not respond to this letter despite a second request to do so, but, in a letter of 13 June 1978, responding to a subsequent letter from plaintiff, defendant claimed that plaintiff was in breach under paragraph 7(d). Defendant next received a letter from plaintiff, dated 27 July 1979, informing him that plaintiff would terminate the agreement effective 1 March 1980.

Although it is not entirely clear from the evidence on what date the original bond coverage terminated, plaintiff concedes there was a period of time before 1 March 1980 when defendant was without coverage under the original blanket fidelity bond. However, it is plaintiff's contention that it met its contractual obligation to defendant by serving as the insurer itself and by accepting all attendant liability during that period.

We do not need to decide whether plaintiff's decision to self-insure defendant until it could terminate the ABECO agreement constituted a material breach, as the evidence indicates that defendant waived any breach on plaintiff's part by continuing to accept performance under the contract. *See Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E. 2d 763 (1980). Defendant's own testimony indicates that he continued to gain business clients directly from ABECO business changeover transactions after 16 February 1978. Therefore, a directed verdict against defendant on plaintiff's breach of the ABECO agreement was proper.

Finally, defendant asserts that the court erred in disallowing certain evidence defendant believed essential to his counter-claims. In some instances, the evidence was, in fact, admitted, and in others, it was barred by the parol evidence rule. Although we find some evidence pertinent to the issue of damages may have been excluded, since verdicts were directed against the claims for which the evidence was offered, any error was harmless.

[5] Defendant's second argument is that the trial court erred in directing a verdict in favor of plaintiff as to license fees owed for the months of June, July, August and September, 1980. We disagree. Rather than finding defendant to be in breach of the agreements, the trial court determined that defendant's letter of 1 July 1980, in which he stated that he "hereby terminate[s]" both the

Marcoin, Inc. v. McDaniel

MMS and BUSCO agreements, constituted a voluntary termination of the contracts. The contract clearly stipulates that the shortest notice one may give of voluntary termination is 90 days. Thus, defendant owed license fees until the end of this notice period. As the computation of the amount of fees due was merely a mathematical determination, there was no need to submit this question to the jury.

[6] Defendant's third argument is that the trial court erred in submitting to the jury the issues of fraud and punitive damages. On this contention, we agree with defendant. The issues submitted to the jury, and the jury's answers thereto, are as follows:

ISSUES

1. After termination of the contract on October 1, 1980, did John E. McDaniel thereafter breach the contract?

ANSWER: Yes

2. What amount, if any, is plaintiff, Marcoin, Inc., entitled to recover from defendant, John E. McDaniel:

Fair market value of client accounts subject to the contract as of 10/1/80	\$66,010.00
Less: Marcoin's purchase price of accounts pursuant to contract	<u>-\$30,361.00</u>

ANSWER: Damage \$35,649.00

3. Did defendant, John E. McDaniel, sell client accounts which were subject to Marcoin's right to purchase under the contract with intent to defraud plaintiff of its option to purchase those accounts?

ANSWER: Yes

4. What amount, if any, is plaintiff entitled to recover for punitive damages from John E. McDaniel?

ANSWER: \$16,000.00

The theory on which these issues were premised, and hence punitive damages awarded, is that this is a case for breach of con-

Marcoin, Inc. v. McDaniel

tract accompanied by fraud, for which punitive damages are allowable. *Hill v. Memorial Park*, 50 N.C. App. 231, 275 S.E. 2d 838, *reversed on other grounds*, 304 N.C. 159, 282 S.E. 2d 779 (1981). Although true, this theory has no applicability to the case at hand. The evidence showed that the client accounts were sold to a corporation whose stockholders were either related to defendant or were his close business associates, that they were sold during the pendency of a suit wherein substantial damages were sought, and that they were sold for far less than their market value. This is not fraud. This is a fraudulent conveyance. See *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979). Even the wording of the third issue is consistent with the elements of fraudulent conveyance, not of fraud.

[7] Once it is established that this case involves a fraudulent conveyance rather than a legal fraud, the law in this area makes it clear that the plaintiff was not entitled to punitive damages. In North Carolina, punitive damages are generally not allowable for a breach of contract, unless there is an identifiable tort constituting or accompanying the breach, which tort contains some element of aggravation. Commenting on which breaches of contract give rise to a claim for punitive damages, our Supreme Court has said that

[w]hile the distinction between malicious or oppressive breach of contract, for which punitive damages are generally not allowed, and tortious conduct which also constitutes, or accompanies, a breach of contract is one occasionally difficult of observance in practice, it is nevertheless fundamental to any consideration of the question of punitive damages in contract cases.

Newton v. Insurance Company, 291 N.C. 105, 111-12, 229 S.E. 2d 297, 301 (1976). In making this distinction here, we conclude that however malicious and oppressive the conveyance of client accounts might have been, the conveyance did not constitute, nor was it alleged to be, a fraud or any other identifiable tort. Rather, the allegations in the amended complaint amount to allegations of a fraudulent conveyance, illustrating *how* the contract was breached. The jury found for the plaintiff on the issue of breach of contract; the jury awarded the plaintiff compensatory damages. At that point, there was nothing further for the jury to decide. It

Marcoin, Inc. v. McDaniel

was therefore unnecessary to submit the fraudulent conveyance issue to the jury, and error to award punitive damages.

[8] Defendant's fourth argument is that the trial court erred in denying his motion to continue, thereby denying him adequate time to prepare his case. This argument is founded on defendant's incorrect assertion that he only had five working days to prepare for the second trial. Plaintiff's motion to amend his complaint was granted on 23 September 1982. Trial on the issues raised by the amended complaint was set for 6 December 1982. Defendant moved to dismiss the amended issues, for a mistrial and for a new jury. His motions were denied on 24 November 1982. On 29 November 1982 defendant began discovery on the amended issues. Apparently, it is from this date that he believes his trial preparation time should be counted. It was within defendant's discretion to opt for the strategy of waiting until the disposition of his motions before commencing discovery; however, when such a strategy fails, he cannot use his self-imposed delay to support a request for a continuance. Defendant had more than two months to prepare his case for trial; we believe this was sufficient.

[9] Defendant's fifth argument is that the trial court erred in denying his motions for a mistrial and for a new jury to hear the amended issues because the jury had been exposed to prejudicial comments by the court. Defendant cites such comments by the trial judge as, "I don't want you gentlemen to play games," and "I don't want any 'to the best of your knowledge,'" as support for his argument that an impression was created on the jury that the judge was expressing an opinion on the evidence or that he disbelieved the defendant's testimony.

The conduct of a trial is left to the sound discretion of the trial judge, and absent abuse of discretion, will not be disturbed on appeal. We do not believe that these few minor comments, made during the course of a week-long trial and one of which is directed at both parties' attorneys, reflect an abuse of discretion. Further, defendant makes no showing of either error or prejudice arising from these remarks. Therefore, we find no merit in defendant's argument.

Defendant's final argument is that the trial court erred in allowing evidence to be admitted concerning defendant's sale of his client accounts. Plaintiff's original complaint sought specific

State v. Richardson

performance of the provision of the license agreement requiring defendant to sell his client accounts to plaintiff upon termination of the agreement. When, at trial, defendant for the first time stated that he no longer owned the client accounts, the issue of their sale became of prime importance. Plaintiff was therefore permitted to amend his complaint and a second trial was set to hear the issues raised by the sale. As the issue of ownership of the client accounts was central to one of the claims for relief, we find that the trial court did not err in allowing evidence of the sale to be admitted.

Affirmed in part; reversed in part.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. FLOYD EDWARD RICHARDSON

No. 8328SC1134

(Filed 2 October 1984)

Criminal Law § 75.2— confession—statements by Tennessee authorities

Defendant's confession to North Carolina authorities should not have been admitted when the uncontroverted evidence was that the confession was induced by the choice, presented by Tennessee authorities, of facing prosecution under the Tennessee habitual criminal statute and a life sentence, or of cooperating with authorities from other states, including North Carolina, and receiving "consideration" which could include probation in Tennessee.

Chief Judge VAUGHN dissenting.

APPEAL by defendant from *Howell, Judge*. Judgment entered 9 February 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 17 September 1984.

Defendant was convicted of felonious breaking or entering, felonious larceny, attempted safecracking and safecracking. He appeals from judgments sentencing him to fifty years in prison.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Nora Henry Hargrove for defendant appellant.

State v. Richardson

WHICHARD, Judge.

Defendant contends the court erred in denying his motion to suppress his confession. We agree, and accordingly award a new trial.

The *voir dire* hearing on the motion to suppress established without contradiction that the confession was made under the following circumstances:

In late September 1981, defendant was arrested in Tennessee on charges of attempted burglary and possession of burglary tools. He was released on bond and returned to his home in Kentucky.

Defendant appeared at a preliminary hearing in Tennessee in mid-October 1981. At that hearing Tennessee authorities threatened to prosecute him under the Tennessee habitual criminal statute if he did not cooperate, and offered him "consideration," help, and the possibility of a probationary sentence if he did cooperate. The "cooperation" requested consisted of talking with authorities from other states about crimes defendant had committed in those states.

Pursuant to defendant's agreement to cooperate, Lieutenant McCoy of the Hendersonville, Tennessee, Police Department arranged for law enforcement officials from several states, including North Carolina, to question defendant. On 5 November 1981 defendant presented himself to McCoy, who drove him in a police car to a local restaurant. There, in a back room, ten or twelve law enforcement officials questioned defendant, one at a time, about various crimes. Defendant thereupon made the confession which was the subject of his motion to suppress at trial. He testified that he confessed to Asheville police detectives only because Tennessee authorities had threatened him with prosecution as a habitual criminal, which possibly meant life in prison, if he did not cooperate with North Carolina authorities. He also stated that Lieutenant McCoy offered him "possibly a probated sentence" if he cooperated. He in fact received a probationary judgment in Tennessee.

Lieutenant McCoy of Tennessee testified that he, Assistant District Attorney Dee Gay, and a third person spoke to defendant

State v. Richardson

following the preliminary hearing in Tennessee. During that conversation it was mentioned to defendant that he could be prosecuted as a habitual criminal, but that any cooperation he showed would be taken into consideration with regard to the charges pending in Tennessee. McCoy did not remember who first mentioned this to defendant or whether it was said to defendant collectively or individually. McCoy additionally told defendant he would testify in other states in defendant's behalf concerning such cooperation.

Gay, the Tennessee Assistant District Attorney, testified that he told defendant he had no control over other jurisdictions and that defendant would be prosecuted for crimes committed in those jurisdictions. He also told defendant, however, that his office would "take . . . into consideration" defendant's cooperation with Detective McCoy about crimes committed in other jurisdictions.

Based on the foregoing *voir dire* testimony, the court found that the North Carolina officers who took defendant's statement did not threaten or coerce him and did not offer hope of reward or inducement. With respect to coercion and hope of reward on the part of Tennessee authorities, the court found:

That some statements had been made with respect to charges pending against him in the State of Tennessee, but the Defendant had been advised that the authorities in the State of Tennessee had no control over what actions would be taken by the State of North Carolina; and in fact, the Defendant was told prior to his statement that the District [A]ttorney in North Carolina would prosecute him.

The court concluded that defendant made his confession voluntarily and denied the motion to suppress.

Incriminating statements obtained by the influence of hope or fear long have been held involuntary and thus inadmissible. See *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v. Roberts*, 12 N.C. 259 (1827) ("a confession obtained by the slightest emotions of hope or fear ought to be rejected."). The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 23, of the North Carolina Constitution prohibit criminal convictions based on involuntary confessions.

State v. Richardson

Our Supreme Court recently enunciated the test for determining the voluntariness of an incriminating statement:

In cases in which the requirements of *Miranda* have been met and the defendant has not asserted the right to have counsel present during questioning, no single circumstance may be viewed in isolation as rendering a confession the product of improperly induced hope or fear and, therefore, involuntary. In those cases the court must proceed to determine whether the statement made by the defendant was *in fact* voluntarily and understandingly made, which is the ultimate test of the admissibility of a confession. In determining whether a defendant's statement was in fact voluntarily and understandingly made, the court must consider the *totality of the circumstances* of the case and may not rely upon any one circumstance standing alone and in isolation.

State v. Corley, 310 N.C. 40, 48, 311 S.E. 2d 540, 545 (1984) (emphasis in original).

The totality of the circumstances here indicates that defendant's confession was induced by both threats and hopes conveyed to him by Tennessee law enforcement officials. Uncontradicted testimony from defendant and from Tennessee authorities revealed that defendant was given the choice, after his arrest in Tennessee, of (1) exercising his right to silence and facing possible, if not probable, prosecution under a habitual criminal statute which could lead to life in prison, or (2) cooperating with officers from other states, including North Carolina, and receiving "consideration" and help from Tennessee authorities. Defendant was released under bond and subsequently returned to Tennessee to make statements to officers from several states. Tennessee officers drove him in a police car to the interrogation location, and the questioning proceeded behind closed doors with ten or twelve officers surrounding defendant. While the Asheville detectives carefully respected defendant's constitutional rights, they recognized that his confession to them was prompted by the hope that it would help him in Tennessee.

The court concluded that the confession was voluntary because there was no coercion or offer of help from North Carolina authorities. Its findings, however, do not address the uncontradicted evidence that Tennessee authorities pressured defend-

State v. Richardson

ant into making his statement. "If *all* the evidence tends to show that investigators made promises or threats to a suspect whose confession is the product of hope or fear generated by such promises or threats, the confession will be ruled involuntary as a matter of law." *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E. 2d 540, 548 (1982) (emphasis in original). See also *State v. Fuqua*, 269 N.C. 223, 152 S.E. 2d 68 (1967) (ordering a new trial where police conduct rendered confession involuntary as a matter of law "since there was no conflict in the pertinent testimony offered on *voir dire*").

We are cognizant of the statement in *Pruitt*, *supra*, 286 N.C. at 458, 212 S.E. 2d at 102, that "any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage." Collateral advantage or boon, however, has been defined to mean, "for instance [...] a promise to give the prisoner some spirits [...] or to strike off his handcuffs [...] or to let him see his wife." *State v. Booker*, 306 N.C. 302, 308, 293 S.E. 2d 78, 82 (1982) (quoting *State v. Hardee*, 83 N.C. 619, 623 (1880), which in turn quotes "1 Taylor Ev., Sec. 802"). Confessions given as a consequence of such inducements need not be excluded. The inducements here, however, related to other criminal charges and are altogether different from the above examples. Further, as Dean Brandis has noted, "[w]hile [the statement in *Pruitt*] is less debatable if confined to the examples given, surely *any* inducement, however 'collateral,' is sufficient to require exclusion if the circumstances indicate a serious possibility that it could trigger a false confession." 2 H. Brandis, North Carolina Evidence Sec. 184 (1982). See *State v. Chamberlain*, 263 N.C. 406, 139 S.E. 2d 620 (1965), in which defendant's confession, induced by the implied threat that he would also be charged with kidnapping, another and more serious crime which, like that of habitual criminal here, involves a potential life sentence, was held inadmissible; *State v. Smith*, 8 N.C. App. 442, 174 S.E. 2d 676, *cert. denied*, 277 N.C. 116 (1970), in which a confession to armed robbery to escape a marijuana charge was held inadmissible.

The facts of the cases cited in support of the statement in *Pruitt*, moreover, bear no relation whatever to those here. In the first of those cases, *State v. Hardee*, 83 N.C. 619 (1880), a young woman promised to marry defendant if he would tell her about

State v. Richardson

the burning of a gin house. Defendant thereupon confessed that he and another committed the burning. No objection was offered to the admission of the confession. *Id.* at 620. Further testimony, admitted over objection, indicated that upon seeing the young woman appear at a preliminary hearing on the charge, defendant had stated: "Lord, that girl is coming here against me." *Id.* This statement, however, was entirely spontaneous; it clearly was not induced by threats or hope of reward.

In the second case, *State v. Pressley*, 266 N.C. 663, 147 S.E. 2d 33 (1966), defendant made a statement to a Georgia sheriff implicating himself in a North Carolina larceny. The Supreme Court expressly noted a crucial distinction between that case and this one by stating: "Defendant makes no contention that his statement . . . was involuntary or that the Georgia officer offered him any inducement to confess a crime committed outside his jurisdiction." *Id.* at 666, 147 S.E. 2d at 35 (emphasis supplied).

We therefore find *Hardee* and *Pressley* readily distinguishable and the above statement from *Pruitt* not dispositive. As indicated above, our Supreme Court recently established as the "ultimate test of the admissibility of a confession" whether it "was in fact voluntarily and understandingly made" as determined by "the totality of the circumstances." *Corley, supra*, 310 N.C. at 48, 311 S.E. 2d at 545. The uncontroverted evidence here shows that defendant's statement was induced by the threat of life in prison if he did not confess and the hope of a "probated judgment" if he did. Application of the "totality of the circumstances" test to that uncontroverted evidence establishes beyond peradventure that the confession was not in fact voluntarily made. We thus hold the confession involuntary as a matter of law, *Chamberlain, supra*, and that its admission requires a new trial.¹

New trial.

Judge JOHNSON concurs.

Chief Judge VAUGHN dissents.

1. Defendant presents a further issue which, in light of the majority decision to award a new trial, the opinion does not address. He contends that double jeopardy

State v. Richardson

Chief Judge VAUGHN dissenting.

I regard defendant's dealings with the court officials in the State of Tennessee as being in the nature of a plea bargain. I am confident he knew what he was doing every minute and made his decision in the cold light of reason. He was no frightened innocent who was led to talk by overreaching promises of law enforcement officials in Tennessee.

In Tennessee he could have been sentenced as a habitual criminal and possibly received a life sentence on probation. According to his testimony, in exchange for his promise to cooperate with law enforcement officers from North Carolina and other states, it was agreed that he would not be sentenced as a habitual felon but would be placed on probation. The State of Tennessee kept the bargain. He, a professional criminal who had pursued his career in several states over a long period of years, was allowed

considerations preclude his conviction and punishment for both breaking or entering and larceny that is felonious only because committed pursuant to a breaking or entering. This Court previously has rejected that argument. *State v. Smith*, 66 N.C. App. 570, 575-76, 312 S.E. 2d 222, 225-26, *disc. rev. denied*, 310 N.C. 747, 315 S.E. 2d 708 (1984); *see also State v. Downing*, 66 N.C. App. 686, 688, 311 S.E. 2d 702, 703 (1984).

It would seem, however, that the breaking or entering cannot properly be used both to convict defendant of a separate crime and to elevate the larceny offense from misdemeanor to felony status and that if, upon re-trial, defendant again is convicted of both breaking or entering and larceny, judgment should be entered on the larceny conviction as upon a conviction for misdemeanor larceny only. *See State v. Edmondson*, 70 N.C. App. 426, 320 S.E. 2d 315 (1984) (questioning holdings of *Smith* and *Downing*); *see also Wood v. Ross*, 434 F. 2d 297 (4th Cir. 1970) (in North Carolina case, double jeopardy where defendant tried for breaking and entering and then tried for a felony in which the breaking and entering was an indispensable element).

Four appeals before this Court during the current calendar year have presented this issue (*Edmondson, supra*; *Downing, supra*; *Smith, supra*; and the instant case). The facts in at least one other presented the issue but the briefs did not address it. The issue likely will recur until the Supreme Court resolves it.

If the State exercises its right to appeal provided by the dissent, this case apparently will present this issue to the Supreme Court for the first time on appeal rather than discretionary review. The judges of this Court do not agree upon the appropriate resolution. Cf. *Edmondson, supra*, with *Smith, supra*. Resolution by the Supreme Court thus would be propitious.

The author of the majority opinion has appended this footnote speaking for himself only and not for the other judges of this panel.

State v. Richardson

to "walk away." By his own admission at the sentencing hearing in this case he had "burglarized over a hundred banks" and was guilty of numerous other burglaries, larceny, auto theft, unlawful possession of stolen state bank currency, causing several illegal explosions and other crimes. He testified that at least one reason for his cooperation with the Tennessee authorities was that he had "decided to start living for God, and when you start living for Jesus Christ and believe in Jesus Christ, if he tells you to do something, you have to do it whether you want to or not. And I had a great desire to help society correct a lot of things that I did in the past." After he was saved in a prison in Terre Haute, Indiana, he returned to crime only briefly to raise money to help defend his daughter on a capital charge. After that was over, he went to Tennessee and "told them everything I did." He even helped the officials there make a training film for the police. He demonstrated methods he used to commit a number of different crimes with the hope that it would help the police in crime prevention.

No one contends defendant was promised any help on the North Carolina case. Indeed, he was assured by the North Carolina authorities that he would be prosecuted. Although he was probably as aware of his "rights" as the officers, before he made his statement to the North Carolina officers he was fully advised of all his constitutional rights and understandingly waived them and confessed. No one promised him anything or did anything to generate any hope that he could expect any relief on the criminal charges to which his confession related.

In sum, defendant was promised nothing, either by the Tennessee officials or those from North Carolina that could possibly indicate the slightest chance that a false confession to the North Carolina crimes was generated by the conduct of the officials. Instead, I believe he made a plea bargain in Tennessee under the terms of which he received a lighter sentence in exchange for, among other things, a confession to crimes committed in North Carolina. This is not coercion in the constitutional sense. I would admit the confession.

Skinner v. E. F. Hutton & Co.

J. TRAVIS SKINNER AND BARBARA R. SKINNER v. E. F. HUTTON & COMPANY, INC., JOHN HUDSON, AND DONALD FONTES

No. 8314SC1171

(Filed 2 October 1984)

Actions § 5; Corporations § 16.1— inside information from stockbrokers—losses suffered by purchasers—doctrine of in pari delicto

Where defendant stockbrokers provided plaintiffs with “inside information” that corporate take-overs of two insurance companies were imminent, plaintiffs relied on the information and purchased stock in the companies, the take-overs did not occur, and plaintiffs subsequently incurred financial losses when they sold their stock, all of plaintiffs’ claims were barred by the doctrine of *in pari delicto*, since, to most effectively insure that the innocent investing public is protected, the unscrupulous tippee was well as the tipper must be deterred.

Judge BECTON dissenting.

APPEAL by plaintiffs and cross appeal by defendants from *Barnette, Judge*. Order entered 8 August 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals on 29 August 1984.

Haythe & Curley by Samuel T. Wyrick, III and James Arthur Pope for plaintiff appellants-appellees.

Manning, Fulton & Skinner by Howard E. Manning and Michael T. Medford for defendant appellees-appellants.

BRASWELL, Judge.

Motivated by “inside information” allegedly provided by the defendant stockbrokers that corporate “take overs” were imminent, the plaintiffs purchased stock in two insurance companies. The “take overs,” however, did not occur. When the plaintiffs subsequently sold their stock in these companies, they incurred financial losses of approximately \$47,526 in stock losses, margin call, margin interest, and brokers’ commissions.

The plaintiffs have appealed from an order of the trial court partially granting the defendants’ G.S. 1A-1, Rule 12(b)(6), motion to dismiss. The trial court ruled that the plaintiffs’ claims, except those relating to the recovery of commissions and margin interest received by the defendants, were barred as a matter of law by

Skinner v. E. F. Hutton & Co.

the doctrine of *in pari delicto*. The defendants have cross-appealed the trial court's failure to dismiss all of the plaintiffs' claims. Although their appeal is interlocutory in nature, we recognize that in order for the plaintiffs to demonstrate their entitlement to a recovery of the commissions and margin interest they will have to prove their entire case including the dismissed claims. Thus, we have decided to treat this case as if it had been allowed under certiorari and to review the parties' appeals on their merits.

The pertinent facts reveal that for their stock trading the Skinners maintained general margin accounts with the defendant E. F. Hutton and Company, Inc. The plaintiffs allege that in early 1981 the defendants Hudson and Fontes, who were registered representatives and account executives with E. F. Hutton, encouraged them to "load up" on securities in two companies they represented as take-over candidates. According to the complaint, in March and April 1981, the defendant Fontes told the plaintiff Travis Skinner that he had "inside information that corporate take-overs were imminent that would shortly drive up the price of Washington National Corporation [hereinafter WNT] and Academy Insurance Group [hereinafter ACIG] which securities were being traded either on an exchange or over the counter." Based on the advice of Hudson and Fontes that the take-overs of WNT and ACIG were definitely going to take place in the near future, the Skinners purchased 3,850 shares of WNT for \$109,850.00 and bought 4,100 shares of ACIG at a cost of \$81,484.00 through their margin accounts at E. F. Hutton.

The defendant Fontes informed the plaintiffs that the WNT take-over would take place by the end of May 1981. However, no take-over or price increase as represented occurred. The defendants Hudson and Fontes at first told the plaintiffs that the ACIG take-over would definitely occur by 28 July 1981. When that information proved incorrect, they stated that the take-over of ACIG would be complete by 28 August 1981. Yet on 28 August 1981, no take-over of ACIG as indicated took place. The plaintiffs also contend that on at least two occasions they could have sold a significant number of their WNT shares at a good profit, but did not due to Fontes' strong advice against selling and his representations that the WNT take-over was imminent and certain. The complaint further alleges that in order "[t]o cut their losses and

Skinner v. E. F. Hutton & Co.

free their capital by the year end, Plaintiffs sold all their holdings in WNT and ACIG in October, November and December 1981, absorbing losses of at least \$47,526.84 in stock losses, brokers' commissions, margin interest, and a margin call." The plaintiffs assert that these losses are a result of their reliance, to their detriment, on the defendants Fontes' and Hudson's false representations.

This appeal comes before us from the trial court's partial granting of the defendants' G.S. 1A-1, Rule 12(b)(6), motion. This motion operates to test the legal sufficiency of the complaint. "In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E. 2d 611, 615 (1979). However, if the complaint discloses an unconditional affirmative defense which defeats the asserted claim, the motion will be granted and the action dismissed. *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E. 2d 161, 166 (1970). The defendants contend that the doctrine of *in pari delicto* is such a defense.

The overriding consideration in this case is whether the evils of inside trading are best combatted by permitting or denying the defendants the benefit of the *in pari delicto* defense. The plaintiffs argue that if the *in pari delicto* defense can effectively be used by tippers then they will be free to disseminate false "inside information" without any fear of legal recourse against them. They contend that tippers as the instigators of the fraud should not be allowed to shield themselves through such a defense. See *Berner v. Lazzaro*, 730 F. 2d 1319 (9th Cir. 1984). The defendants, on the other hand, assert that by denying the use of this defense to the tipper a "no lose" situation is created for the tippee who is equally unscrupulous. For instance, if the inside information turns out to be true, then the tippee will receive the profits from the tip. If the inside information turns out to be false, then the tippee can recover his losses by suing the tipper. See *Kuehnert v. Textstar Corp.*, 412 F. 2d 700 (5th Cir. 1969). Literally translated *in pari delicto* means "in equal fault." Black's Law Dictionary 711 (5th ed. 1979). The doctrine precludes an action based on a fraudulent, illegal, or immoral transaction to which the plaintiff was a party. Thus, where the parties are equally in the wrong, the courts will not give one party legal redress against the other, but will leave them where it has found them. 1 Am. Jur. 2d, Ac-

Skinner v. E. F. Hutton & Co.

tions Sec. 52 (1962). The complaint on its face alleges that the plaintiffs knew that Hudson and Fontes were providing them with "inside information" concerning the professed imminent corporate take-overs. The plaintiffs further admit that they bought stock in WNT and ACIG based on this information. Therefore, if the defendants are allowed the use of the *in pari delicto* defense, the defendants' Rule 12(b)(6) motion was properly granted.

The plaintiffs argue that since the information given by the defendants Hudson and Fontes was not true inside information they were not tippees. They also argue that even if they can be considered tippees, they were not in equal fault with the defendants as required for a successful *in pari delicto* defense. Federal law has defined a "tipper" as "a person who has possession of material inside information and who makes selective disclosure of such information for trading or other personal purposes. A 'tip-pee' is one who receives such information from a 'tipper.'" *Tarasi v. Pittsburg National Bank*, 555 F. 2d 1152, 1154, fn. 1 (3d Cir.) cert. denied, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed. 2d 451 (1977), citing 2 A. Bromberg, Securities Law: Fraud, S.E.C. Rule 10b-5 at 190.7 (1973). It is obvious from the complaint that the plaintiffs' purchase of the stock in WNT and ACIG was motivated by the alleged inside information related by the defendants Hudson and Fontes. For the purpose of asserting an *in pari delicto* defense, the fact that the plaintiffs believed they possessed "inside information" and took steps to profit from this knowledge in violation of the anti-"inside information" policy of the securities laws is sufficient justification for classifying them as tippees. See *Kuehnert v. Texstar Corp.*, *supra* at 702-05.

Similarly, we feel that the plaintiffs' actions also place them in equal fault with the defendants in their attempt to undermine the objectives of the North Carolina and federal securities laws. The North Carolina securities anti-fraud provision, G.S. 78A-8, closely parallels the S.E.C. Rule 10b-5. Among the fundamental purposes underlying Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78j(b)) and S.E.C. Rule 10b-5 are to promote free and open public securities markets, to protect the investing public from inequities in trading, and to insure that the investing public should be subject to identical market risks and allowed equal access to the rewards of participation in securities transactions. See *S.E.C. v. Texas Gulf Sulfur Co.*, 401 F. 2d 833

Skinner v. E. F. Hutton & Co.

(2d Cir. 1968), *cert. denied*, 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed. 2d 756 (1969). These securities laws seek to protect the innocent public who is not privy to selectively disclosed tips. In the present case, the plaintiffs have admitted that their securities purchases were made in an effort to take advantage of information not known to the investing public and if possible to profit at their expense. Surely, the plaintiffs are equally at fault with the defendants as far as taking steps which would have hurt the investing public had their attempt at fraud been successful. We fully recognize that even though a person may possess the appropriate *mens rea* for a crime, if the action he takes to carry out that intent still does not amount to a crime, then no crime has been committed. However, in determining whether the *in pari delicto* defense may be asserted, we believe that since on the face of the complaint both parties violated the spirit of the securities laws against secret disclosure, they were at equal fault, especially in view of the fact that the plaintiffs knowingly and willingly participated in what they hoped would be a profitable fraud.

We hold that the defendants may assert the *in pari delicto* defense. Although heretofore securities laws promulgated to protect against the disclosure of "inside information" have primarily been used to stop tippers, we feel that to most effectively insure that the innocent investing public is protected, the unscrupulous tippee as well as the tipper must be deterred. The concept of selective disclosure of inside information assumes the fact that the tipper will tell a tippee who will act on the information and unfairly profit by it at the public's expense. We find it persuasive that the investing public will more readily be protected if those tippees are discouraged from acting on any "inside information" illegally disclosed. It is also more probable that inside trading will stop if tippers realize the senselessness of risking criminal prosecution for disclosing "inside information" to a tippee who will not use the information. Moreover, there should be no opportunity in the scheme of securities laws' enforcement for the tippee to weigh the reliability and the value of the tip against the amount he may be able to recover in a lawsuit against the tipper for his disclosure of false "inside information," especially when that tippee could conceivably recover treble damages under the Unfair Trade Practice Act. *See* G.S. 75-1 *et seq.* By allowing the *in pari delicto* defense the unscrupulous tippee will be acting at his own

Skinner v. E. F. Hutton & Co.

risk when he knowingly buys stocks based on what he believes is "inside information."

Furthermore, the plaintiffs' reliance on *Webb v. Fulchire*, 25 N.C. 485 (1843) is misplaced. In *Webb*, the plaintiff thought he was making a fair wager on a shell game which was forbidden by gambling laws. However, the ball had been deceitfully removed by the defendant. The court reasoned that the plaintiff was not *in pari delicto* with the defendant and that since he parted with his money under the mistaken belief that it had been fairly lost by him, he could recover it. First of all, in the gambling situation, as the *Webb* court suggested, "the artless fool . . . bereft of his senses and his money" needed protection from himself. *Id.* at 487. The securities laws against inside trading, on the other hand, were meant to protect the securities markets, the innocent investing public, as well as the gullible tippee. In the present case, the plaintiffs were not gullible, unsophisticated investors. They knew that the profit they sought would be made due to information illegally related to them. Even when they recognized that they could sell their WNT shares for a good profit, their greed and unwise reliance on the defendants Fontes' and Hudson's inside knowledge persuaded them to wait for the corporate takeovers. Also, unlike the plaintiff in *Webb*, the Skinners cannot claim that they had played the stock market game according to the rules and had parted with their money under the mistaken belief that the defendants Fontes and Hudson were also playing fairly. The Skinners had full knowledge that the defendants were unprincipled and untrustworthy when they disclosed to them the "inside information." Likewise, the plaintiffs gladly participated in the wrongful conduct and became disenchanted only after discovering that the defendants' sword of deceit and breach of trust was double-edged.

In conclusion, although we reluctantly accept the arguments of a party who by allegations instigated the fraud in the first place, we do feel that the evils of inside trading are best combated by a policy which allows the defendants to assert the defense of *in pari delicto*. Since the complaint discloses this unconditional affirmative defense, we hold the trial court properly granted the defendants' Rule 12(b)(6) motion with regard to the plaintiffs' claims for stock losses and margin call. In turn, we further hold that the *in pari delicto* defense must work as a bar against all the

Hyde v. Taylor

claims for relief asserted by the plaintiffs, including those for commissions and margin interest. The complaint fails to state any claim upon which relief can be granted. The order of the trial court is

Affirmed in part and reversed in part.

Judge HILL concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that our primary concern in inside trader actions should be to deter the instigator, the tipper, and, therefore, that the *in pari delicto* defense should not be allowed, I dissent. A tippee's private cause of action against the tipper for the recovery of commissions and margin interest eliminates any illegal profit by the tipper. More importantly, it effectively discourages the tipper from distributing inside information, thereby eliminating the tippee's temptation to participate in the illegal activity.¹ Further, the tippee is not equally at fault. I would, therefore, affirm the trial court's order.

WALLACE N. HYDE, W. TED PHILLIPS, AND J. TED JORDAN v. JOHN R. TAYLOR AND MRS. JOHN R. (PAT J.) TAYLOR

No. 8328SC1075

(Filed 2 October 1984)

1. Mortgages and Deeds of Trust § 32.1— deficiency statutes—lack of deficiency or foreclosure

The anti-deficiency statutes, G.S. 45-21.36 and G.S. 45-21.38, did not bar an action on a note when there was no deficiency because plaintiffs had paid the full amount due at the foreclosure sale, and when plaintiffs sued on an entirely different obligation from that which prompted foreclosure.

1. See *Berner v. Lazzaro*, 730 F. 2d 1319 (9th Cir. 1984).

Hyde v. Taylor

2. Rules of Civil Procedure § 56.3— summary judgment—affidavit—personal knowledge

Defendants presented a sufficient forecast of the evidence to satisfy the requirements of G.S. 1A-1, Rule 56(e), and thus the trial court erred in granting plaintiffs' motion for summary judgment, where plaintiffs and defendants presented contradictory affidavits alleging specific facts based on personal knowledge.

3. Rules of Civil Procedure § 56.4— summary judgment—statute of limitations—failure of opposing party to present evidence

In a counterclaim for fraud in which plaintiff raised the statute of limitations, partial summary judgment was proper where defendants presented no evidence indicating that they did not discover or should not have discovered any fraud until within three years of the filing of their counterclaim.

4. Fraud §§ 3.2, 5.1— misrepresentation of value—inspection—readily apparent aspects

Defendants' forecast of the evidence was insufficient to establish an affirmative defense of fraud where alleged defects in the property suggested only that the property was worth less than expected, and where defendants had thoroughly inspected the property before executing a contract and note.

APPEAL by defendants from *Lewis, Robert D., Judge*. Judgment entered 7 January 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 21 August 1984.

Plaintiffs sued to recover principal and interest on a \$179,627 promissory note executed by defendants. From summary judgment in favor of plaintiffs' claim and against defendants' counterclaim, defendants appeal.

Herbert L. Hyde for plaintiff appellees.

Lentz, Ball & Kelley, by Ervin L. Ball, Jr., for defendant appellants.

WHICHARD, Judge.

Defendants contend the court erred in granting summary judgment for three reasons: (1) the anti-deficiency statutes, G.S. 45-21.36 and 45-21.38, bar plaintiffs' suit on the note; (2) a genuine issue of material fact exists as to whether plaintiffs breached their contract with defendants and thereby discharged defendants' obligation on the note; and (3) defendants' defense and counterclaim for fraud and misrepresentation involve disputed issues of material fact. We agree as to the second reason, and we thus remand for trial on that issue only.

Hyde v. Taylor

The facts relevant to defendants' contentions are as follows. Through plaintiffs, defendants negotiated the purchase of a motel owned by Piney Mountain Properties, Inc. (Piney). Hyde Insurance Agency, Inc. (Agency) held a lease on the property and an option to purchase. The three individual plaintiffs had no ownership interest in the motel; they were shareholders in either Piney or Agency and largely controlled those corporations.

On 2 May 1973 Piney, Agency, plaintiffs and defendants executed the following documents: (1) a memorandum of option to purchase between Piney and defendants, (2) a contract and agreement between Piney, Agency, plaintiffs and defendants, (3) a deed of trust from Piney and defendants to plaintiffs and their trustee, and (4) a promissory note from defendants to plaintiffs.

The contract and agreement stated that defendants were "desirous of acquiring all right, title and interest of Piney, Agency, and of Wallace N. Hyde, W. Ted Phillips and J. Ted Jordan, individually and as stockholders in Agency" Because Piney did not have marketable fee simple title to the motel, the sale was structured to convey the present rights that Piney, Agency and plaintiffs had in the motel, and contained a promise to convey legal title in the future. Plaintiffs anticipated obtaining marketable title for Piney once the total payments made to first mortgagee First Atlantic Corporation (First Atlantic) plus \$49,040.10 equalled or exceeded \$961,875, at which time Piney could make a motion in the cause in pending legal proceedings to extinguish another lien on the property.

The contract provided that defendants would pay Agency \$50,000 at the signing of the agreement and would deliver a promissory note for \$179,627 to plaintiffs. It also stated that the note was "full payment for all right, title and interest of Agency and the named individuals as shareholders and custodians of shares in said Agency . . . and for contractual rights in and to said premises of Agency and the named individuals" The note was secured by a second deed of trust on the motel. Defendants further agreed to assume the first note and deed of trust held by First Atlantic. In return, Piney was to convey marketable title to defendants when it acquired it. Plaintiffs further contracted to repay to defendants all payments made after they were entitled to the deed but did not receive it.

Hyde v. Taylor

Defendants made payments on the mortgage to First Atlantic through March 1976. When plaintiffs refused to deliver to defendants a deed to the motel property, defendants stopped making payments and assigned their interest to a third party. The obligation to First Atlantic consequently went into default. First Atlantic foreclosed in 1977, and Piney bid in for the balance due. Title was conveyed to Piney, and Piney in turn conveyed to the individual plaintiffs, who ultimately sold the property to a third party. The second deed of trust that secured the note to plaintiffs was cancelled when plaintiffs sold the property to the third party. Plaintiffs instituted this action, claiming that defendants had defaulted on the note to them.

I.

[1] Defendants first pleaded in defense that the anti-deficiency statutes, G.S. 45-21.36 and 45-21.38, barred plaintiffs' action on the note. These statutes bar deficiency judgments in certain circumstances. They have no bearing on the present case because (1) plaintiffs do not seek a deficiency judgment, and (2) plaintiffs never had the opportunity to foreclose.

A deficiency judgment is an "imposition of personal liability on mortgagor for unpaid balance of mortgage debt after foreclosure has failed to yield full amount of due debt." *Black's Law Dictionary* 379 (5th ed. 1979). Because plaintiffs, acting through Piney, paid the full amount due to First Atlantic at the foreclosure sale, there was no deficiency. Moreover, plaintiffs sued on an entirely different obligation from that which prompted foreclosure. G.S. 45-21.36 allows a debtor to claim a setoff against a deficiency judgment to the extent that the bid at the foreclosure is substantially less than the true value of the realty, where (1) the creditor forecloses pursuant to a power of sale clause, (2) there is a deficiency, and (3) the creditor who forecloses is the party seeking a deficiency judgment. Thus, by its terms, G.S. 45-21.36 does not apply to the present case. See *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 34, 185 S.E. 482, 485 (1936), *affirmed*, 300 U.S. 124, 81 L.Ed. 552, 57 S.Ct. 338 (1937).

Defendants cite *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979), for the proposition that a creditor may not circumvent G.S. 45-21.38 by suing on the

Hyde v. Taylor

note as an alternative to foreclosing. In *Ross Realty* the vendor-creditor could have foreclosed, but due to a decline in value of the subject property it chose instead to sue on the underlying debt. The present case is distinguishable in that plaintiffs could not foreclose and therefore were not attempting to circumvent the anti-deficiency statute. In a case similar to this one, our Supreme Court held that, notwithstanding the anti-deficiency statute, a creditor could sue on the purchase money note he held where he had lost the opportunity to foreclose due to an earlier foreclosure by another creditor. *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E. 2d 601 (1940). "It is apparent that this statute [the predecessor to G.S. 45-21.38] does not by its terms prohibit the holder of a note, though secured by a second deed of trust, from obtaining judgment on the note when the property has been sold under another deed of trust having priority of lien." *Id.* at 487, 8 S.E. 2d at 602. See also *Barnaby v. Boardman*, 70 N.C. App. 299, 318 S.E. 2d 907 (1984); *Blanton v. Sisk*, 70 N.C. App. 70, 318 S.E. 2d 560 (1984).

Ross Realty and *Brown* together can lead to an illogical result: if the debtor is solvent, but the property securing the debt is inadequate security, the senior purchase money creditor may be left with a deficiency it cannot recover, while the creditor with subordinate security could sue on the full outstanding debt. See Note, *Mortgages and Deeds of Trust—Ross Realty Co. v. First Citizens Bank & Trust Co.: North Carolina Anti-Deficiency Judgment Statute Bars Personal Actions Against Purchase Money Mortgagors*, 58 N.C. L. Rev. 855, 861-63 (1980). The present case is controlled by *Brown*, however, and policy issues raised by *Ross Realty* are beyond the scope of this decision. Defendants cannot claim the anti-deficiency statutes as an affirmative defense.

II.

[2] Defendants also pleaded as a defense and counterclaim that plaintiffs breached their contract, thereby discharging defendants' obligation on the promissory note and entitling them to recover certain sums they spent on the motel. As noted above, the contract provided that if defendants met the \$961,875 payment level and plaintiffs then failed to deliver a marketable fee simple title to the motel, plaintiffs guaranteed to repay to defendants all payments made after they were entitled to the deed but did not

Hyde v. Taylor

receive it. This guarantee effectively discharged defendants from the duty to make further payments.

Plaintiffs presented an affidavit which averred that defendants did not make sufficient payments to entitle them to the motel deed. Defendants supplied a counter-affidavit asserting they had made sufficient payments. The documents presented thus show a genuine issue of material fact. The pleadings, interrogatory answers, affidavits and other materials do not contain documentary evidence of payments made through March 1976, but the affidavits do allege specific facts based on personal knowledge concerning the payments made by defendants. Accordingly, defendants presented a sufficient forecast of evidence to satisfy the requirements of G.S. 1A-1, Rule 56(e). The court thus erred in granting plaintiffs' motion for summary judgment with respect to defendants' breach of contract defense and counterclaim.

III.

[3] Defendants finally contend that they should prevail on their defense and counterclaim for fraud. Their pleadings allege that plaintiffs fraudulently induced them to agree to buy the motel by misrepresenting the condition of the premises and the occupancy rate. Plaintiffs denied making such representations and further stated that defendants conducted a thorough examination of the motel before entering the contract. Plaintiffs also raised as a defense the statute of limitations, G.S. 1-52.

As to the latter, defendants counterclaimed for fraud on 9 March 1982. The alleged misrepresentations and fraud occurred on or about 2 May 1973 when the contract and note were signed. G.S. 1-15, 1-46, and 1-52(9) establish a three year limitation for bringing claims based on fraud. The period begins to run upon "the discovery by the aggrieved party of the facts constituting the fraud" G.S. 1-52(9). Our Supreme Court has interpreted this language to mean that "the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence." *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 7, 149 S.E. 2d 570, 575 (1966).

Once plaintiffs pleaded the statute of limitations, the burden was on defendants to show that they instituted their fraud claim

Hyde v. Taylor

within the allotted time. *Id.* at 8, 149 S.E. 2d at 575; *Swartzberg v. Reserve Life Ins. Co.*, 252 N.C. 150, 156-57, 113 S.E. 2d 270, 277 (1960). Defendants presented no evidence indicating that they did not discover or should not have discovered any fraud until within three years of the filing of their counterclaim. The forecast of evidence strongly suggests the opposite. Partial summary judgment as to defendants' counterclaim for fraud was proper.

[4] Defendants also pleaded fraud as a defense to the action on the promissory note. Plaintiffs denied all allegations of misrepresentation. Defendants subsequently filed an affidavit which stated that they were not informed of certain physical defects in the motel and that they were told the occupancy rate of the motel ran at eighty percent. The affidavit stated that defendants experienced only up to thirty percent occupancy.

Assuming that the allegations in defendants' affidavit are true, they nevertheless fall short of establishing the elements of fraud. Fraud requires a false representation or concealment of a material fact, reasonably calculated to deceive, made with intent to deceive, which does in fact deceive, resulting in damage to the party who is the object of the misrepresentation. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981). No evidence suggests that the representation of an eighty percent occupancy rate prior to the contract was false. The alleged defects in the motel suggest only that defendants received consideration worth less than they expected. Inadequacy of consideration alone is an insufficient basis on which to set aside an instrument on the grounds of fraud. *Cowart v. Honeycutt*, 257 N.C. 136, 142, 125 S.E. 2d 382, 386 (1962). Before it is sufficient evidence to be submitted to the jury on an issue relating to fraud, the inadequacy must be "so gross and palpable as to shock the moral sense." *Id.* The forecast of evidence does not establish such "gross and palpable" inadequacy.

Finally, plaintiffs in their interrogatory answers stated that defendants thoroughly inspected the motel property before executing the contract and note. This evidence was not contradicted. Defendants could not reasonably rely on non-representations or misrepresentations about readily apparent aspects of the physical condition of the motel after they had inspected it. *Marshall v. Keaveny*, 38 N.C. App. 644, 648-50, 248 S.E. 2d 750, 753-54 (1978). Defendants' forecast of evidence thus was legally insufficient to establish an affirmative defense of fraud.

State v. Hopkins

The result is that the judgment is affirmed except as it relates to the issue of whether plaintiffs breached their contract with defendants and thereby discharged defendants' obligation on the note. As to that issue it is reversed, and the cause is remanded for further proceedings which accord with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. ELLIOTT CLIFTON HOPKINS

No. 8322SC1132

(Filed 2 October 1984)

1. False Pretense § 1— false pretense distinguished from passing worthless checks—additional representation

Defendant was properly indicted and convicted for obtaining property by false pretenses under G.S. 14-100, rather than for passing worthless checks under G.S. 14-106 and 107, where defendant made an affirmative and false representation regarding his employment status, and thereby made an additional misrepresentation beyond the presentation of a worthless check.

2. False Pretense § 3.1— motion to dismiss—evidence sufficient

There was sufficient evidence for conviction under G.S. 14-100 where defendant made a false representation of a "subsisting fact," his employment status; where there was evidence from which the jury could reasonably infer that seven payroll checks had not been issued to defendant, an ex-employee, on a closed account a week after the dissolution of the business, and that such evidence revealed an intent to defraud; and where the store to which the check was presented was deceived, and defendant received value, despite the fact that the check was not presented for payment. G.S. 14-106.

3. False Pretense § 3— evidence from which intent could be inferred—relevant

In a prosecution for obtaining property by false pretense, testimony that the business on which the check had been drawn had closed its account and that all checks presented against the account had been and would be dishonored was clearly relevant.

4. Searches and Seizures § 37— passenger area of automobile—plain view—warrantless search of envelopes and wallets—evidence of a separate crime

Where contraband in plain view was observed from a legally obtained vantage point beside defendant's car and defendant was lawfully arrested, envelopes and wallets were potential "containers" of evidence and could be the

State v. Hopkins

subject of a warrantless search. Evidence found therein was properly admitted even if it constituted evidence of a wholly separate crime.

APPEAL by defendant from *Cornelius, Judge*. Judgment entered 10 August 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 17 September 1984.

Defendant was indicted for violations of G.S. 14-100, obtaining property by false pretense; G.S. 90-95, misdemeanor possession of marijuana; and G.S. 90-113.22, possession of drug paraphernalia. At the close of the State's evidence the Court, on its own motion, dismissed the drug related charges. Defendant was found guilty of obtaining property by false pretense and sentenced to three years in prison.

The State's evidence shows that on 1 May 1983, the defendant, Elliott Hopkins, presented a \$165 payroll check to a Roses Department Store in exchange for merchandise and cash change. The check was typed, signed with a signature stamp, issued 29 April 1983, and made payable to the order of Elliott C. Hopkins. In order to cash the check, defendant displayed to the store clerk an employment identification card from his alleged employer, United Credit Help (United). In reality, the defendant was a former, not present, employee of United. Moreover, the company had dissolved on 19 April 1983 and closed its bank account. As defendant was leaving the store, Roses received a bulletin regarding bad checks drawn on United's account and immediately called the Statesville Police Department. The suspicious check was turned over to the police and was never deposited or presented to the drawee, First Union National Bank.

In response to the complaint, the defendant was stopped and questioned by Officer D. L. Drum of the Statesville Police Department. As defendant sat in his rented vehicle, the officer noticed marijuana in plain view in the passenger compartment. Officer Drum arrested the defendant for possession and secured the defendant in his patrol car. An immediate search of the passenger and glove compartment incident to this arrest produced evidence related to the present case. This evidence included a wallet containing the false identification, a large amount of currency and six United payroll checks in a white envelope, three of which were payable to defendant. The checks bore the date of 29 April 1983,

State v. Hopkins

the same date on the one presented to Roses. The envelope also contained a copy of Chapter 14 of the General Statutes. At the police station, defendant gave his written, informed consent to the search of the vehicle's trunk compartment. This additional search produced a metal signature stamp bearing the name of Ronald McGill, owner of United, and the purported payor of defendant's payroll checks.

The trial court refused to exclude the fruits of the two searches or to reduce the offense charged to a misdemeanor worthless checks violation. The jury returned a verdict of guilty and defendant appeals.

Attorney General Edmisten, by Associate Attorney Michael Smith, for the State.

Constance T. Barker, for defendant appellant.

VAUGHN, Chief Judge.

[1] The defendant's initial contention is that it was improper for him to have been convicted under the felony false pretense statute, G.S. 14-100, when the misdemeanor offense of passing worthless checks, G.S. 14-106 and 14-107, was allegedly applicable. We disagree.

In *State v. Freeman*, 308 N.C. 502, 302 S.E. 2d 779 (1983), our Supreme Court expressly rejected this defendant's position on remarkably similar facts. In that case, the Court affirmed Freeman's conviction under G.S. 14-100 for aiding and abetting in the false representation that one Harry Gaston was an employee of Budget Merchandise and Financing Company (Budget), and that Gaston was entitled to cash a payroll check on Budget's bank account. In reality, Freeman knew at the time that Budget was a fictitious business, created for the express purpose of defrauding merchants. Freeman was indicted and tried under G.S. 14-100 because he did more than present a worthless check. He helped to create and perpetuate the appearance of a non-existent business, the purpose and effect of which was to deceive others.

The *Freeman* Court reemphasized that the crime of obtaining property by false pretense pursuant to G.S. 14-100 requires: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which

State v. Hopkins

does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *Id.* at 511, 302 S.E. 2d at 784 (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E. 2d 277, 286 (1980)). When these elements are present, a wrongdoer may properly be indicted and convicted of obtaining property by false pretenses under G.S. 14-100. *Freeman* illustrates that the passing of a worthless check in the criminal scheme does not preclude an indictment for this offense. G.S. 14-100 and a worthless checks offense under G.S. 14-106 and 14-107 are not coextensive. Prosecution under the former is improper only where there is no additional misrepresentation beyond the presentation of a worthless check. A wrongdoer is not insulated from greater criminal liability for such additional acts simply because a worthless check is involved.

In the present case, defendant also did more than merely present a worthless check. By presenting an employee identification card, defendant made an affirmative and false representation regarding his employment status. "[T]he crime of obtaining property by means of a false pretense may be committed when one obtains goods . . . by wilful misrepresentation of his identity . . ." because "[t]he decision of a merchant to extend credit ordinarily turns upon his evaluation of the financial status and history of the applicant." *State v. Tesenair*, 35 N.C. App. 531, 535, 241 S.E. 2d 877, 880 (1978). See also *State v. Kilgore*, 65 N.C. App. 331, 308 S.E. 2d 876 (1983) (defendant's conviction under G.S. 14-100 upheld because he improperly portrayed himself as an agent after his authorization had been terminated). Defendant did not create a fictitious business as did *Freeman*, but he nevertheless perpetuated and took advantage of the appearance of legitimacy surrounding United, a business which was in dissolution and whose bank account had been closed. It was therefore appropriate for defendant to have been indicted under G.S. 14-100. Since there is, as a result, no ambiguity in the applicable law, defendant's claims of due process and double jeopardy violations are without merit.

[2] Alternatively, the defendant maintains that the State's evidence was insufficient to prove the individual elements necessary for conviction under G.S. 14-100, as set forth in *State v. Cronin*, *supra*. We disagree. First, defendant made a false representation of a "subsisting fact," his employment status, when he presented

State v. Hopkins

the worthless check to Roses. G.S. 14-100; *see* discussion, *supra*. Second, there was sufficient evidence to support a reasonable jury conclusion that defendant "made the false pretense charged with an intent to defraud." G.S. 14-100; *see State v. Phillips*, 228 N.C. 446, 45 S.E. 2d 535 (1947). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E. 2d 506, 508 (1974). "[I]n determining the presence or absence of the element of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged. . . ." *State v. Norman*, 14 N.C. App. 394, 399, 188 S.E. 2d 667, 670 (1972). In the present case, this circumstantial material includes the evidence found in defendant's car, evidence that United had been dissolved and had closed its bank account, and the evidence of defendant's misrepresentation. It is defendant's position that this evidence is negated by Roses' failure to actually present the check to First Union for payment. The record clearly indicates, however, that the account was closed and that all checks presented would not be honored but returned. The jury could, as a result, reasonably infer that United did not issue seven payroll checks to the defendant, as an ex-employee, drawn on a closed account a week after dissolution and that such evidence revealed an intent to defraud.

Third, the record shows that Roses was in fact deceived and fourth, that defendant did receive value from the store as a result. Once again, it is of no importance that Roses did not actually present the check for payment. Roses was nevertheless deceived when it gave up cash and merchandise for the worthless check. This is not a case where the drawer sustains a loss because of a lack of due diligence in presentment for payment. *Compare Nunn v. Smith*, 270 N.C. 374, 154 S.E. 2d 497 (1967) (lack of due diligence in presenting a check within a reasonable time will operate as constructive payment of the debt for which it is given). Roses acted reasonably in immediately turning the check over to the police. Unlike the language of G.S. 14-106, G.S. 14-100 did not require them to needlessly pursue the formalities of commercial paper while a suspect escaped. The trial court therefore made no error in denying defendant's motions to dismiss due to insufficient evidence.

State v. Hopkins

[3] Defendant next argues that the trial court erred in admitting the testimony of David S. Lanier, First Union's branch manager, on the grounds that such testimony was not relevant to any issue in the case. This contention is without merit. "To be relevant, evidence must have some logical tendency to prove a fact at issue in the case. [Citation omitted.] '[E]vidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.'" *State v. Wilson*, 57 N.C. App. 444, 450, 291 S.E. 2d 830, 834, cert. denied, 306 N.C. 563, 294 S.E. 2d 375 (1982) (quoting *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973)). In the case at hand, Lanier testified that United's account had been closed and that all checks presented against this account had been and would be dishonored. This evidence is clearly relevant. At the very least, it describes a circumstance by which defendant's fraudulent intent may be inferred and helps to discount his claim of legitimate possession of the checks. *Supra*. Lanier's testimony was also relevant to show the reasonableness of Roses' reaction and to establish the validity of defendant's initial detention at the hands of Officer Drum. See, e.g., *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 2641, 61 L.Ed. 2d 357, 362 (1979) (brief detention for questioning is a seizure and may be grounded on a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity"). There was no error in admitting Lanier's testimony.

[4] In his final assignment of error, defendant claims that the warrantless searches of his car violated the Fourth and Fourteenth Amendments to the United States Constitution and that the evidence obtained in these searches should have been excluded at trial. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

The first search of defendant's vehicle was limited to the passenger compartment and was properly conducted as a search incident to a valid arrest. The permissible scope of such searches is set forth in the recent decision of *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed. 2d 768 (1981). Accord, *State v. Cooper*, 304 N.C. 701, 286 S.E. 2d 102 (1982).

In *Belton*, the United States Supreme Court adopted a "bright line" rule whereby any police officer who has made a

State v. Hopkins

lawful custodial arrest of the occupant of a vehicle may make a contemporaneous warrantless search of both the vehicle's passenger compartment and the contents of any containers found therein. "'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments . . . as well as luggage, boxes, bags, clothing, and the like." *Belton*, 453 U.S. at 461 n. 4. Moreover, the term "contemporaneous" has been defined so as to permit the search of a vehicle even after the suspect has been arrested and secured apart from his vehicle. *Cooper, supra*.

In the case *sub judice*, defendant was properly detained and questioned by Officer Drum in response to the Roses complaint. See *Brown v. Texas, supra*; *State v. Jones*, 304 N.C. 323, 283 S.E. 2d 483 (1981). From his legally obtained vantage point beside defendant's car, Dunn observed contraband in plain view in the passenger compartment and lawfully arrested defendant with probable cause. *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067 (1968); *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976). He then secured defendant in his patrol car and searched the vehicle in accordance with the *Belton* ruling.

Defendant concedes that he was validly detained and arrested, but attempts to distinguish *Belton* on the facts. In both *Belton* and the present case, probable cause for arrest was based on the sighting of illegal drugs, in plain view, in the passenger compartment. In *Belton*, however, the search incident to arrest produced additional contraband *per se* and not the evidence of a wholly separate crime. Defendant therefore contends that any search based on an arrest for possession of a controlled substance must be limited to a search for similar material. We believe this position to be completely untenable. First of all, *Belton* authorizes the search and seizure of any "evidence," as well as contraband, within the area under the control of defendant. Since evidence may be found in many forms, it would completely emasculate the *Belton* "bright line" rule to delineate and link different levels of searches to a myriad of underlying offenses. The purpose and effect of the *Belton* rule is to remove all doubt about the proper scope of a search incident to the valid arrest of a vehicle's occupant. We therefore hold that envelopes and wallets are properly considered potential "containers" of evidence and may be the sub-

Robins & Weill v. Mason

ject of a warrantless search under *Belton* and *Cooper*. The results of this search were properly admitted into evidence.

No error.

Judges WHICHARD and JOHNSON concur.

ROBINS & WEILL, INC. v. HOMER L. MASON AND ROGER M. HILL, INDIVIDUALLY AND TRADING AS BUSINESS INSURERS

No. 8318SC1201

(Filed 2 October 1984)

Master and Servant § 11.1— covenants not to compete—preliminary injunction proper

The trial court properly granted plaintiff's motion for a preliminary injunction enjoining defendants from breaching covenants not to compete contained in their employment contracts where plaintiff presented evidence that its president and vice-president personally discussed the requirement of signing a covenant not to compete with defendants as a condition of their employment; plaintiff presented the affidavits of seven of its employees who were specifically told in pre-employment interviews that a covenant not to compete would be required and who had the terms of their individual employments, once finalized, reduced to writing and signed; plaintiff offered the signed contracts of defendants, dated as of the time they began working for plaintiff, in which they agreed not to compete; plaintiff offered evidence that the covenant was a reasonable means used by plaintiff to protect its legitimate business interest and was reasonable as to time, three years, and territory, at most only two counties; and plaintiff was likely to sustain irreparable loss unless the injunction was issued.

APPEAL by defendants from *Hobgood (Hamilton H.)*, Judge. Order entered 15 August 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 August 1984.

Stern, Rendleman & Klepfer by Robert O. Klepfer, Jr., for plaintiff appellee.

Helms, Mulliss & Johnston by E. Osborne Ayscue, Jr., for defendant appellants.

Robins & Weill v. Mason

BRASWELL, Judge.

Robins and Weill, Inc., the plaintiff-insurance agency, brought this action to enjoin two of its former employees from breaching covenants not to compete contained in their employment contracts. After a hearing the trial court entered a preliminary injunction against the defendants. The defendants appealed and also filed in the Court of Appeals petitions to stay the preliminary injunction and a writ of supersedeas. In an *ex parte* order, this Court stayed the preliminary injunction as far as it prevented the defendants from competing in all lines of general insurance, but kept intact that portion of the injunction which forbade the defendants from selling commercial line property and casualty insurance, until a final decision on the merits had been reached in the trial division. From this ruling, both parties appealed to the Supreme Court which denied their motions.

The pertinent facts of this case follow: The defendant Mason was employed by the plaintiff on 14 August 1972. The defendant Hill was first employed on 12 August 1974. Both men were hired to secure and service commercial insurance accounts. The defendants contend that several weeks after they had each started to work they were handed employment contracts to sign which contained the following covenant not to compete:

4. Mason [Hill], as consideration for his employment by the Company and in consideration of the covenants and agreements herein provided to be performed by the Company, agrees that at no time during the term of his employment, or for a period of three (3) years beginning at the termination of his employment, will he for himself or on behalf of any other person, persons, partnership or corporation, engage directly or indirectly in the general insurance business in competition with the Company within Guilford County, [as to Hill, also Randolph County] North Carolina; nor will he in any way directly or indirectly for himself or on behalf of or in conjunction with any other person, persons, partnership or corporation, solicit, divert, or take away any of the customers or business of the Company during the aforesaid period in Guilford County, N.C. [as to Hill, also Randolph County].

Robins & Weill v. Mason

On 30 June 1983, Mason was fired by the plaintiff because he had approached insurance companies for which the plaintiff was an agent with the proposition that they appoint him as their agent when he left the employment of Robins and Weill. On 1 July 1983, Hill resigned from the employment of Robins and Weill. Mason and Hill on or about 1 July 1983 then opened their own general insurance business in Greensboro under the name of "Business Insurers." According to the defendant's brief, "[t]here is no dispute that the defendants were competing with the plaintiff in Guilford County at the time the suit was brought and defendants did not challenge the reasonableness of the purported covenants as they relate to time or territory."

The defendants assert that the covenant not to compete contained in the documents had never been mentioned before or bargained for as a part of their original employment agreement. Because their written employment contracts were executed after they had started to work for the plaintiff pursuant to their oral employment agreements, the defendants contend that the covenant found within the written documents was not supported by valuable consideration.

The plaintiff, however, argues that it is its established practice to obtain covenants not to compete with its employees prior to and as a condition of employment. John P. Young, III, senior vice president and agency manager for Robins and Weill, testified by affidavit that he discussed with Mason and Hill in several pre-employment conversations that they would have to sign a covenant not to compete with the agency. In addition to their discussions, Young furnished Mason with a copy of the written covenant used by Robins and Weill. Young also testified that he told Mason and Hill that the terms of their employment which had previously been discussed would later be reduced to a written agreement. Thereafter, Mason signed a written employment contract, dated 14 August 1972, with the plaintiff agreeing not to compete or to attempt to lure away any of the plaintiff's clients. Hill also signed an employment contract, dated 12 August 1974, agreeing not to compete with the plaintiff or to solicit its customers.

The ultimate issue for our determination is whether the trial court properly granted the preliminary injunction against the de-

Robins & Weill v. Mason

fendants. "The term, 'preliminary injunction' refers to an interlocutory injunction issued after notice and hearing which restrains a party pending trial on the merits. G.S. 1A-1, Rule 65." *Pruitt v. Williams*, 288 N.C. 368, 371, 218 S.E. 2d 348, 350 (1975). Of course, no appeal lies to an appellate court from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose absent a review prior to final determination. G.S. 1-277; G.S. 7A-27(d)(1). "Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment." *State v. School*, 299 N.C. 351, 358, 261 S.E. 2d 908, 913, *rehearing on other grounds*, 299 N.C. 731, 265 S.E. 2d 387, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed. 2d 11 (1980). In the present case, we hold that the granting of the plaintiff's motion for a preliminary injunction deprived the defendants of a substantial right. By the terms of the covenants not to compete, the defendants are forbidden from engaging "in the general insurance business" in competition with the plaintiff. The trial court's enforcement of the covenant has effectively closed the defendants out of the insurance business in the territory where they have recently begun an insurance agency of their own. See *Industries, Inc. v. Blair*, 10 N.C. App. 323, 331, 178 S.E. 2d 781, 786 (1971). With the covenant lasting for three years, we recognize, as the Supreme Court did in *A.E.P. Industries v. McClure*, 308 N.C. 393, 401, 302 S.E. 2d 754, 759 (1983), that "where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. . . . Nevertheless, because this case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address the issues."

The scope of appellate review in the granting or denying of a preliminary injunction is essentially *de novo*. "[A]n appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *Id.* at 402, 302 S.E. 2d at 760. A preliminary injunction, as a general rule, will be issued only "(1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss

Robins & Weill v. Mason

unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E. 2d 566, 574 (1977).

In our review of the record it appears that the plaintiff has shown a likelihood of success on the merits. The plaintiff has presented the affidavits of its president, Charles L. Weill, Jr., and senior vice-president, John P. Young, that they personally discussed the requirement of signing a covenant not to compete with Mason and with Hill as a condition of their employment. The plaintiff also presented the affidavits of seven of its employees who were specifically told in pre-employment interviews that a covenant not to compete would be required and who had the terms of their individual employments, once finalized, reduced to writing and signed. Finally, the plaintiff has offered the signed contracts of Mason and Hill, dated as of the time they began working for the plaintiff, in which they agreed not to compete against the plaintiff at the termination of their employment.

An enforceable covenant not to compete must be: (1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a legitimate business interest of the plaintiff. *A.E.P. Industries v. McClure*, *supra*, at 403-404, 302 S.E. 2d at 760-61; *see*, G.S. 75-4. On appeal, the defendants have contested the reasonableness of the covenants. In our review of the trial court's granting of the preliminary injunction, we do not determine whether or not the covenants are in fact reasonable, but rather whether from the evidence presented the plaintiff has shown a likelihood that the clause will be held reasonable when this case is heard on the merits. The plaintiff has offered evidence that it was engaged in the general insurance business and that the defendants through their positions with the agency had access to valuable information concerning the insurance needs of the plaintiff's customers. From the evidence before us the trier of fact could conclude that the covenant was a reasonable means used by the plaintiff to protect its legitimate business interest and was reasonable as to time and territory since the covenant restricts the defendants' activities for only three years and at most in only two counties.

Robins & Weill v. Mason

The only prerequisite for an enforceable covenant contested by the defendants below was whether the covenant was based on valuable consideration. The defendants contend that the determination of this issue does not turn on the resolution of the factual conflict of the parties as to whether or not the covenant requirement was discussed with the defendants prior to their employment. We must disagree. If the covenants were a part of the original verbal employment contract, then they were founded on valuable consideration. The fact that the written contracts were executed after the defendants had started work is insignificant. The covenants became enforceable once they were put in writing and signed by the party to be charged. *Industries, Inc. v. Blair, supra*, at 332, 178 S.E. 2d at 787. The covenants are therefore not void as a matter of law and the issue of consideration which hinges on the credibility of the parties will be decided according to whose version the trier of fact believes. Thus, we hold that the plaintiff has indeed shown a likelihood of success when the merits of this case are tried.

The second prong of the test in granting a preliminary injunction is whether the plaintiff is likely to sustain irreparable loss unless the injunction is issued or if the issuance is necessary for the protection of the plaintiff's rights during the course of litigation. The need for the preliminary injunction to protect the rights of the plaintiff during litigation is self-evident. Because the covenants are only for three years from the time of the defendant's termination of employment, time is of the essence. A denial of the plaintiff's motion for a preliminary injunction would essentially serve to foreclose much of the relief the plaintiff sought by obtaining the covenant not to compete from the defendants in the first place. See *A.E.P. Industries, Inc. v. McClure, supra*, at 405-06, 302 S.E. 2d at 762. Also, the defendants have started their own insurance agency which they admit is now in competition with the plaintiff. Mr. Hill also admitted that when he left the plaintiff's employment he took with him a copy of its customer list. In order to protect the plaintiff during the course of this litigation from the defendants' possible use of information they obtained while employees concerning the plaintiff's clients and their clients' particular insurance coverage, the granting of the preliminary injunction was necessary.

Stilwell v. Walden

We hold the trial court properly granted the plaintiff's motion for a preliminary injunction. Thus, the partial temporary stay of the preliminary injunction previously issued by this Court is vacated. By affirming the trial court and by vacating the temporary stay, the plaintiff has been granted its desired relief until a final decision on the merits has been reached in the trial division. Therefore, the later motion filed by the plaintiff in response to the granting of the partial stay in favor of the defendants is denied.

Affirmed.

Judges HILL and BECTON concur.

R. RON STILWELL, ADMINISTRATOR OF THE ESTATE OF GEORGE ERVIN SPEIGLE v.
JOYCELYN C. WALDEN

No. 8322SC1019

(Filed 2 October 1984)

1. Fraud § 7—constructive fraud—fiduciary relationship

In an action alleging constructive fraud, there was evidence from which a jury could find that a confidential or fiduciary relationship existed where there was evidence that plaintiff's intestate relied upon defendant to handle his funds and see that his needs were attended to, and where defendant made purchases for plaintiff's intestate, paid his bills, managed his investments, and saw to it that his household was properly operated and his needs supplied. A confidential or fiduciary relation can exist under a variety of circumstances and is not limited to those persons who also stand in some recognized legal relationship to each other, such as attorney and client, principal and agent, guardian and ward, and the like.

2. Rules of Civil Procedure §§ 8, 32; Evidence §§ 23, 24—introduction of deposition when deponent present—introduction of admissions in the pleadings proper

The deposition of a party, if otherwise admissible, may be introduced even if that party is present in court; furthermore, plaintiff was not only entitled to introduce defendant's admissions into evidence, but had a right to have the court tell the jury that facts stated therein were not disputed. G.S. 8-83(2), (9). Rules 7(d), 32(a)(3) of the N. C. Rules of Civil Procedure.

Stilwell v. Walden

3. Fraud § 11; Cancellation and Rescission of Instruments § 9.1— administration of trust funds—constructive fraud—undue influence—mental incapacity—evidence of self interest relevant

Testimony that tends to show that defendant had her interest in mind in administering plaintiff's intestate's trust funds and that defendant's interest was also a factor in the trust being established in the first place was plainly relevant and material to an action to recover assets plaintiff's intestate allegedly conveyed to defendant due to constructive fraud, mental incapacity, and undue influence.

4. Fraud § 11; Cancellation and Rescission of Instruments § 9.1— evidence of intestate's health—relevant

In an action to recover assets allegedly conveyed to defendant due to constructive fraud, mental incapacity, and undue influence, testimony concerning plaintiff's intestate's health, appearance, and inability to talk coherently, though insufficient by itself to establish mental incapacity, was nevertheless relevant on that issue and the other issues.

APPEAL by plaintiff from *Davis, Judge*. Judgment entered 27 April 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 7 June 1984.

Plaintiff administrator sued to recover assets his intestate allegedly conveyed to defendant due to constructive fraud, mental incapacity, and undue influence. At the close of plaintiff's evidence the case was dismissed by verdict being directed against plaintiff on all the claims made.

The plaintiff's evidence, viewed in its most favorable light, tended to show the following: Plaintiff's intestate, George Ervin Speigle, lived at his home on Buffalo Shoals Road in Iredell County with his wife, Hazel Shaver Speigle, until she died intestate in February of 1981. Under the Intestate Succession Act, Mr. Speigle was the sole distributee of Mrs. Speigle's estate, the assets of which included about \$60,000 in cash, 833⅓ shares in A. L. Shaver and Sons, Inc., a corporation founded and owned by her family, and interests in several pieces of real estate. Mr. Speigle renounced his right to administer the estate in favor of defendant, who was Mrs. Speigle's niece. For several years before Mrs. Speigle died defendant had taken care of her business affairs by writing her checks, paying her bills, and balancing her checkbook. After Mrs. Speigle died, defendant did similar services for Mr. Speigle, among other things paying his bills, managing his investments, and obtaining domestic employees to run his house-

Stilwell v. Walden

hold and look after his personal needs. Most of the time after his wife died, Mr. Speigle was confined to a wheelchair, and after May of 1981 suffered from chronic brain syndrome and increasing confusion. Sometime before 3 September 1981 defendant made an appointment for Mr. Speigle to see Attorney James P. Ashburn in Statesville. Mr. Ashburn represented her as administrator of Mrs. Speigle's estate and his firm represented A. L. Shaver and Sons, Inc., where defendant had been employed for thirty years. Defendant drove Mr. Speigle to his appointment with Mr. Ashburn and was in the conference room with them while the interview was conducted, which led to Mr. Ashburn preparing some papers for Mr. Speigle's signature. When the papers were ready, defendant picked them up and they have been in her possession ever since. On 3 September 1981 defendant drove Mr. Speigle to Troutman and parked the car in front of the North Carolina National Bank Building, Mr. Speigle remaining in the car; and a Notary Public from the bank went to the car where Mr. Speigle signed the papers involved, defendant holding his hand while he did so. The documents executed were a trust agreement and a deed, which conveyed all the net assets of his wife's estate, which he had not then received, to defendant in trust for his benefit during his lifetime and thereafter to her in fee simple. Mr. Speigle did not read the documents before signing them, and after they were signed defendant kept them and gave no copies to Mr. Speigle. Sometime during the first two weeks of September 1981 defendant was at A. L. Shaver and Sons' plant in Statesville when Mr. Speigle's caretaker drove him there; defendant came out of the plant, went to the car, and assisted him while he signed in blank the assignment form on a certificate for 833 $\frac{1}{3}$ shares of A. L. Shaver and Sons' stock that had been purportedly issued to him on 4 September 1981. On that same day A. L. Shaver and Sons, Inc. issued a certificate for the same number of shares to defendant as trustee under the trust agreement. When the case was tried defendant was secretary-treasurer and general manager of A. L. Shaver and Sons, Inc.

Baumberger and Bell, by Michael P. Baumberger, for plaintiff appellant.

Homesley, Jones, Gaines & Fields, by Edmund L. Gaines, for defendant appellee.

Stilwell v. Walden

PHILLIPS, Judge.

At trial plaintiff undertook to prove the three grounds alleged in the complaint for invalidating the transfer of his intestate's property to the defendant—constructive fraud, undue influence, and mental incapacity. The evidence presented was clearly sufficient, in our opinion, to establish the constructive fraud claim; and though it was not sufficient to establish the undue influence and mental incapacity claims, the new trial required should be on these claims as well, since much evidence relevant to these claims was erroneously excluded by the court during the course of the trial.

[1] Fraud, actual and constructive, is so varied in form many courts have refused to precisely define it, lest the definition itself be turned into an avenue of escape by the crafty and unscrupulous. *Standard Oil Company v. Hunt*, 187 N.C. 157, 121 S.E. 184 (1924). Nevertheless, the legal principles that govern constructive fraud claims are well established. One is that a case of constructive fraud is established when proof is presented that a position of trust and confidence was taken advantage of to the hurt of the other. *Terry v. Terry*, 302 N.C. 77, 273 S.E. 2d 674 (1981); *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); 37 C.J.S. *Fraud* § 2 (1943). Another is that when a transferee of property stands in a confidential or fiduciary relation to the transferor, the transferee has the burden of showing that in getting the property he acted fairly and in good faith. *Stone v. McClam*, 42 N.C. App. 393, 257 S.E. 2d 78, *rev. denied*, 298 N.C. 572, 261 S.E. 2d 128 (1979). That virtually all of the property of plaintiff's intestate was transferred to defendant without payment or valuable consideration is admitted by the pleadings. Thus, the only other thing that plaintiff had to prove to make out a case of constructive fraud was that a confidential or fiduciary relationship existed between defendant and plaintiff's intestate when the property was transferred. The trial judge ruled that no evidence from which the jury could find that such a relationship existed had been presented. We disagree.

A confidential or fiduciary relation can exist under a variety of circumstances and is not limited to those persons who also stand in some recognized legal relationship to each other, such as attorney and client, principal and agent, guardian and ward, and

Stilwell v. Walden

the like; it also "extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). A clearer example of a confidential relationship within the purview of the foregoing case would be hard to find. According to the evidence Mr. Speigle relied upon defendant to handle his funds and see that his needs were attended to, and she made purchases for him, paid his bills, managed his investments, and saw to it that his household was properly operated and his needs supplied. Obviously, such evidence bespeaks dependence and confidence on the one hand and influence on the other; which relationship was accentuated by the fact that the intestate, because of his health, was unable to do for himself and therefore needed the help of others. The court was apparently of the opinion that what had to be shown was a wrongfully acquired influence or control, but that is a requirement of fraud and undue influence, not constructive fraud. That influence over another is honestly and properly acquired does not lessen its effect and is beside the point in a constructive fraud case. It is just because confidence in others inherently and inevitably begets influence that the law of constructive fraud is needed, lest that influence be exerted for the benefit of the one having it, rather than that of the one whose confidence created it. This decision is also in accord with the recently decided case of *Curl v. Key*, 311 N.C. 259, 316 S.E. 2d 272 (1984), where our Supreme Court held that a fiduciary relationship was created by circumstances that were less traditional and much weaker, it seems to us, than those recorded here, which fall but little short of establishing the relationship of principal and agent.

[2] During the course of the trial the court also made a number of other errors to plaintiff's prejudice. One of the most damaging was in refusing to permit plaintiff to introduce defendant's deposition, which plaintiff had taken during the discovery period. The basis for this refusal was that defendant was present in court and could therefore testify from the stand if plaintiff saw fit to use her. While that is a proper basis for excluding the deposition of a witness, G.S. 8-83(2), (9), it is no basis for excluding the deposition of a party, which Rule 32(a)(3) of the N.C. Rules of Civil Procedure makes useable without restriction, if otherwise admissible under

Stilwell v. Walden

the rules of evidence. *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979). And when plaintiff out of necessity put defendant on the stand, he was not permitted to question her about certain material admissions made in the answer to the complaint; nor was he allowed to read these admissions to the jury. The basis for these rulings was that reading pleadings to the jury is forbidden by Rule 7(d) of the N.C. Rules of Civil Procedure. The only effect and purpose of that rule, however, was to eliminate the former practice of introducing cases to the jury by reading the pleadings; it is not concerned with the admissibility of evidence, one of the basic principles of which, under our adversary system of litigation, is that anything a litigant says about his case, if relevant and not otherwise rendered inadmissible, can be put in evidence against him. 2 Brandis N.C. Evidence § 167 (1982). Because of this rule, the testimony of police officers, doctors, accident scene visitors, and others as to what some litigant said at one time or another about some issue in his case is routinely accepted in the courts of the state every court day. And, of course, there is an additional reason for receiving into evidence a party's statement in the pleadings that his case is being tried under, as was the case here. Until a pleading is withdrawn or changed with the court's approval, it is a binding judicial admission of any fact stated therein; and that the pleading was signed only by the lawyer makes no difference, unless it is made to appear that the party's attorney acted without authority, of which there was no suggestion in this instance. Under the circumstances that existed, therefore, plaintiff was not only entitled to introduce defendant's admissions in the pleadings into evidence, but had a right to have the court tell the jury that the facts stated therein were not disputed. 2 Brandis N.C. Evidence § 171 (1982). Under our practice, pleadings are the indispensable cornerstones of every litigant's case, and whether they are done by the parties themselves or by their hired representatives they do not become irrelevant when the trial begins.

[3] Travis Shaver, Mrs. Speigle's brother's wife, was called by plaintiff to testify concerning a conversation she had with the defendant approximately three months after the trust was set up. In relevant part, her testimony, objected to and excluded from the jury, would have been that the defendant was upset about certain expenditures that she had been asked to make from the

Stilwell v. Walden

trust. The witness stated she told defendant that since Mr. Speigle's property would go to his sisters upon his death defendant should not be reluctant to spend as requested on Mr. Speigle as long as he lived. According to the witness, the conversation continued as follows:

[S]he said to me, "At George's death, everything he has will be mine." I said, "Joycelyn, that's just what you think, why do you say that?" She said, "Because I took him to the attorney's office and drew up—or had drawn up—the document where he signed stating at his death everything he had would go to me." I said, "Now, Joycelyn, you know that will not hold water." She said, "Well, you wait and see, that's the way it is."

The relevancy and materiality of this testimony is plain. It tends to show that defendant had her own interest in mind in administering Mr. Speigle's trust funds and that her interest was also a factor in the trust being established in the first place. Other testimony indicating defendant's reluctance to make certain purchases for Mr. Speigle's benefit from the trust fund was also improperly excluded.

[4] Still other testimony improperly excluded by the court concerned Mr. Speigle's health, appearance, and inability to talk coherently at different times during the year that his property was conveyed away and defendant's interest in A. L. Shaver and Sons, Inc. during the period involved. The evidence as to Mr. Speigle's health, though insufficient by itself to establish his mental incapacity, was nevertheless relevant on that issue and the other issues, as well, since one in poor physical or mental health is often more susceptible to influence, both undue and otherwise, than are those in good health. And the evidence as to defendant's relationship with A. L. Shaver and Sons tended to support plaintiff's contention that defendant acted for her own benefit, rather than that of Mr. Speigle's, since it was during that same period that defendant's position in the company also improved.

New trial.

Judges WEBB and JOHNSON concur.

Maxton Housing Authority v. McLean

MAXTON HOUSING AUTHORITY v. ANITA McCOY McLEAN

No. 8316DC1088

(Filed 2 October 1984)

1. Ejectment § 3— nonpayment of rent—responsible party—ejectment proper

There was no merit to defendant's contention that she should not be evicted for nonpayment of rent because her husband alone was liable under the doctrine of necessities for rent payments on an apartment leased from plaintiff, since N.C. law allows the Housing Authority to sue in summary ejectment the party, in this case the defendant tenant, whose name alone is on the lease.

2. Ejectment § 3— nonpayment of utilities—ejectment proper

A provision in the parties' lease that immediate eviction would result if utilities were discontinued because of nonpayment was enforceable since its intent was to insure safe and sanitary dwelling accommodations, and plaintiff was not required to allege and prove any physical damage to the apartment as a result of the cut-off of utilities. G.S. 42-37.1(c).

Judge BECTON dissenting.

APPEAL by defendant from *McLean, Judge*. Orders entered 20 June 1983 in District Court, ROBESON County. Heard in the Court of Appeals 22 August 1984.

Mason, Williamson, Etheridge and Moser by Andrew G. Williamson for plaintiff appellee.

Lumbee River Legal Services, Inc., by Phillip Wright for defendant appellant.

BRASWELL, Judge.

Defendant appeals from orders evicting her from her apartment leased from the plaintiff Housing Authority because of nonpayment of rent and utilities. After a careful review of all assignments of error, we find no error and affirm the District Court.

[1] The basic facts of nonpayment of rent and utilities are not disputed. The thrust of the defendant's argument is that her husband alone is liable for the rent payments. We disagree.

The obligations of the defendant accrued pursuant to her written lease agreement with the plaintiff on 1 July 1980. The

Maxton Housing Authority v. McLean

lease was executed in her name only. Although defendant married David McLean on 10 October 1981, his name was added to the lease as an occupant, but not as a lessee. On 24 March 1982, David McLean moved out of the defendant's apartment following domestic criminal action by her against him.

The rent for January, February, and March 1982 was not paid. Section 12.1 of the defendant's lease provides that "'nonpayment of rent'" is a material noncompliance with the lease and a ground for termination. As we interpret the defendant's argument, she contends that she was not individually liable for the rent's nonpayment, but that her husband, under the doctrine of necessities, was responsible for the rent payments and that the Housing Authority ought to sue and collect the rent money due from him. See *Cole v. Adams*, 56 N.C. App. 714, 289 S.E. 2d 918 (1982). Even assuming that the plaintiff could sue David McLean under this or any of the defendant's other theories, the law of North Carolina allows the Housing Authority to sue in summary ejectment the party (in this case the defendant tenant) whose name alone is on the lease. For her failure to comply with a valid provision in her lease, she was properly ordered evicted.

[2] The lease also provides in section 7 that "[a]ll utilities shall be paid by the Resident. If utilities are discontinued because of nonpayment, this will result in *immediate* eviction." The defendant argues that "[t]he electricity was cut off because Mr. McLean was not paying the bills." She admits that "the electricity was discontinued for nonpayment." She also acknowledges that the water to her apartment was cut off for nonpayment from 28 May 1982 to 22 June 1982. During this time she did not live in the apartment but stayed with her parents.

Defendant also argues that section 7 of the lease, as quoted above, is unenforceable because it "creates an irrebutable presumption that a tenant is unfit for continued occupancy in a Housing Authority unit if the tenant's utilities are discontinued for nonpayment," in violation of her constitutional rights. We disagree. A dwelling without utilities, such as water, sewer, or electricity, certainly creates a situation where unsafe and unsanitary dwelling accommodations would exist, and which are problems properly identified and sought to be corrected by North Carolina's Housing Authority Law, G.S. 157-2. Furthermore, the

Maxton Housing Authority v. McLean

plaintiff is not required to allege and prove any physical damage to the apartment has occurred because the utilities have been cut off.

We further disagree that the defendant can defend against the action for eviction for her nonpayment of the utilities by claiming it constitutes a retaliatory eviction.

We clarify that there are two cases between these same parties which were ultimately consolidated for trial and appeal. The first case, filed 11 March 1982, was for the nonpayment of rent. The second case, filed 20 July 1982, involved the nonpayment of her utilities. Under judgment in each case on 20 June 1983 the defendant was found in violation of a respective term of the lease and ordered evicted.

It is true, as reflected in G.S. 42-37.1(a)(4), that "[a] good faith attempt to exercise, secure or enforce any right existing under a valid lease or rental agreement or under State or federal law" affords protection to a tenant within twelve months of the filing of the landlord's action. *See* G.S. 42-37.1(b). However, G.S. 42-37.1(c) provides that notwithstanding the defense of retaliatory eviction "a landlord may prevail in an action for summary ejectment if: (1) [t]he tenant breached the covenant to pay rent or any other substantial covenant of the lease for which the tenant may be evicted, and such breach is the reason for the eviction." The language and terms of the lease are clear and not in dispute. The nonpayment of utilities bills was admitted. This nonpayment is a violation of section 7 of the lease. This violation was a material noncompliance with the lease and authorized the plaintiff to proceed in summary ejectment in the second action. The grounds for the second case were nonexistent when the first case was filed. There was no retaliatory eviction.

Affirmed.

Judge HILL concurs.

Judge BECTON dissents.

Maxton Housing Authority v. McLean

Judge BECTON dissenting.

If I deemed it proper to resolve abstract principles, or, indeed, to decide cases in a vacuum, without reference to the facts of a case, I could easily join the majority in concluding that the Maxton Housing Authority (MHA) properly terminated Anita McCoy McLean's lease. A consideration of the specific facts in this case, however, prompts me to dissent.

Mrs. McLean was evicted from her apartment because of non-payment of rent and utilities. It must be remembered, however, that at the time Mrs. McLean became a tenant of MHA, she was the unmarried mother of two children and *paid no rent*. And, although Mrs. McLean was responsible for paying her utilities, she received a subsidy—a utility check from MDA—to apply toward her utility bills.¹

Because, and only because, Mrs. McLean, on 10 October 1981, married David McLean, the father of her children, and reported her marriage to MHA, *as she was required to do*, her total rental payments increased to \$171.00 per month. Mr. McLean's subsequent unemployment decreased the rental payment contribution to \$73.00 per month effective 1 February 1982.

Mr. McLean failed to make the January, February, and March 1982 rental payments, totalling \$332.00. When Mrs. McLean discussed the unpaid bills with him, he assaulted her. Mr. McLean was subsequently convicted of assault and nonsupport, and on the day of the trial (24 March 1982) moved out of the apartment. Perhaps as early as the first magistrate's hearing on 6 April 1982, but clearly by the time of the trial *de novo* in district court, MHA had notice of the parties' domestic situation and knew that Mr. McLean was no longer in the apartment.

1. In federally subsidized housing programs, "rent" generally includes a reasonable utility allowance. See 24 CFR §§ 880.201, 881.201, 882.102, 883.302 and 884.102 (1984). The utility allowance for an apartment such as the one Mrs. McLean was living in is forty-two dollars (\$42.00) per month. Accordingly, if the amount of Mrs. McLean's income that is to go towards rent (including utilities) is less than forty-two (\$42.00) dollars per month, Mrs. McLean will receive the difference between her rental payment and forty-two dollars (\$42.00) in the form of cash or check. This money is then applied by Mrs. McLean towards her utility bill. For example, if Mrs. McLean has 0 income, she should then receive a credit of forty-two (\$42.00) dollars from the Housing Authority to be used as payment for her utilities.

Maxton Housing Authority v. McLean

The majority's suggestion that there was no contractual relationship between MHA and Mr. McLean ignores the factual realities of the situation. Here, the amount of rent was based *solely* on Mr. McLean's income. MHA was relying on *his* estate and credit, and not on Mrs. McLean's estate and credit. (*Compare Presbyterian Hospital v. McCartha*, 66 N.C. App. 177, 310 S.E. 2d 409 (1984) in which this Court, in discussing the doctrine of necessities, said: "[W]hen anyone sells or furnishes necessities to a married woman in her individual capacity, *and in reliance upon her separate estate or credit*, it is the law in most jurisdictions that the husband is not liable, and that the creditor must seek payment from the one contracted with. [Citations omitted.]" *Id.* at 179, 310 S.E. 2d at 411. (Emphasis added.) In my view, the social policy that spun the doctrine of necessities, *see Robertson v. Robertson*, 218 N.C. 447, 11 S.E. 2d 318 (1940) and *McClure v. McClure*, 64 N.C. App. 318, 307 S.E. 2d 212 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E. 2d 651 (1984), is applicable here. After all, when Mrs. McLean married Mr. McLean, she lost what was apparently her only source of income—Aid to Families with Dependent Children (AFDC) since AFDC is conditioned on the father's absence from the home.

When the logic of MHA's argument is considered, not on some lofty abstract plane, but rather, in the context of real people who are cast out of what may be the only housing available to them, the conclusion that Mrs. McLean was wrongfully evicted from her federally subsidized housing becomes apparent. To allow Mrs. McLean to be evicted on the facts of this case would violate the legislative policy codified in N.C. Gen. Stat. § 157-2 (1982) of "the providing of safe and sanitary dwelling accommodations for persons of low income . . . for which public money may be spent. . . ." Moreover, if we carried MHA's argument to its illogical conclusion, this would be the result: Mr. McLean is a stranger to the lease, and he has no contractual relationship with MHA; his income should, therefore, not be considered by MHA at all; Mrs. McLean has no income, so when you exclude Mr. McLean's income because he is a stranger, no rent would be due MHA.

Separate and apart from my conclusion that the social policy underlying the doctrine of necessities is applicable in this case is my further conclusion that the judgment for back rent and eviction should not have been entered against Mrs. McLean when she

State v. Craver

was not individually at fault in reference to the nonpayment of rent. Due process requires a "good cause" analysis.

Thus, in their attempt to cure the evils of discriminatory and arbitrary eviction procedures prevalent in federally-subsidized housing, the courts have established a standard of 'good cause' as a condition upon which tenancies in public housing may be terminated.

Goler Metropolitan Apartments, Inc. v. Williams, 43 N.C. App. 648, 651, 260 S.E. 2d 146, 149 (1979), *disc. rev. denied*, 299 N.C. 328, 265 S.E. 2d 395 (1980). In short, I believe there must be some causal connection—some nexus—between the imposition of the drastic sanction of eviction and Mrs. McLean's own conduct. See *Tyson v. New York City Housing Auth.*, 369 F. Supp. 513 (S.D. N.Y. 1974)

Finally, based on the above analysis, I also believe the trial court erred in evicting Mrs. McLean based on the nonpayment of utility bills.

STATE OF NORTH CAROLINA v. RANDY G. CRAVER

No. 8322SC1267

(Filed 2 October 1984)

1. Searches and Seizures § 23— search warrant—sufficiency of affidavit

A motion to suppress evidence seized under a search warrant was properly denied where the supporting affidavit stated that the informant was known by the affiant personally and had given information in the past which he had always found to be true; the defendant had been arrested for possession of a Cadillac body and Corvette with serial numbers removed; the informant saw in the described building a Cadillac within the past three days; he saw the same frame at another location having a motor put in it; he advised the affiant that the defendant had a red stolen Cadillac in the building with a specified serial number which had been disassembled, and parts of which were in three places in the building; some citizen informants saw the defendant move two Cadillac frames into the building and some other car frames, and observed entry by the defendant at irregular hours, late at night and early morning; and a police information network check of the serial number supplied by the confidential informant revealed that the Cadillac was a stolen vehicle.

State v. Craver

2. Automobiles § 134; Receiving Stolen Goods § 1— stolen automobile—possession of disassembled parts

Defendant was properly tried under the provisions of G.S. 14-71.1, possessing stolen goods, rather than G.S. 20-106, receiving or transferring stolen vehicles, because the automobile had been disassembled, and it was no longer a "device in, upon, or by which any person or property is or may be transported or drawn upon a highway . . ." G.S. 20-4.01(49).

3. Criminal Law § 181— motion for appropriate relief—filing after appeal—time limit for filing

The trial court erred in denying defendant's motion for appropriate relief on the grounds (1) that the motion was filed more than ten days after entry of judgment when less than ten days passed excluding Saturday and Sunday; and (2) that the case had been appealed when G.S. 15A-1414(c) provides that the motion may be made and acted upon whether or not notice of appeal has been given. However, defendant received a fair trial free of prejudicial error and the denial of the motion for appropriate relief was harmless error. G.S. 15A-1414(a), G.S. 15A-1448(a)(4).

4. Constitutional Law § 67— identity of informant—disclosure not required

Although the privilege of allowing the identity of an informant to remain confidential is not absolute, defendant did not show that disclosure was essential to a fair determination of his rights under the Fourth and Fifth Amendments, the search was made on the basis of a search warrant showing probable cause, and the informant did not participate in and was not a material witness to the crime; therefore, the court did not err in denying defendant's motion to disclose the informant's identity. G.S. 15A-978(b)(1).

APPEAL by defendant from *Hairston, Judge*, on denial of his motion for appropriate relief and from judgment entered by *DeRamus, Judge*. Judgment entered 3 August 1983 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 29 August 1984.

Defendant Randy Craver was charged with felonious possession of stolen goods with a value in excess of \$400.00 in violation of G.S. 14-71.1 after police officers, executing a search warrant, discovered disassembled parts of a stolen vehicle in a building leased by defendant. Prior to trial defendant moved to suppress evidence seized during this search. The trial court denied the motion. Defendant was tried, convicted, received a maximum ten year sentence, and was fined \$100,000.00.

Attorney General Rufus L. Edmisten by Assistant Attorney General William B. Ray for the State.

Bruce C. Fraser for defendant appellant.

State v. Craver

HILL, Judge.

On 16 September 1982 Hubert and Audrey Simmons of Columbia Park, Maryland, parked their reddish-maroon 1982 Eldorado Cadillac valued at \$21,000.00 in the Holiday Inn parking lot in High Point. It was stolen during the night. The automobile contained a parking permit for "Level A" in the building housing the U.S. Department of Transportation, Federal Aviation Division. Audrey Simmons kept the parking permit near the automobile door by the driver's seat.

By affidavit in the application for the search warrant, Detective Lester Bass swore to the following pertinent facts to establish probable cause for the issuance of a search warrant:

On Jan. 27, 1983 I talked with a person (Source #1) who is known to me personally and has furnished me with information in the past. The source #1 has given information in the past which has always been found to be true and reliable and I have made arrests of persons for various crimes as a result of his cooperation. Source #1 is not a paid police informer.

Source #1 says that Randy Craver is working on cars at the . . . metal building. Source #1 stated that Craver has a reputation for working on stolen cars.

The person also said he saw a Cadillac frame in the building within the last three days and then saw the same frame again at another location having a motor put into it.

. . .

I contacted Source #1 again on Jan. 28, 1983. He said Craver had a stolen Cadillac in the building. He further said the Cadillac was red in color and was able to furnish the serial number; IG6AL578CE634331. He said the vehicle was disassembled and the parts were in several places in the building. He described at least three rooms in which parts of the vehicle could be found.

On Jan. 28, 1983 at 19:37 hrs. I entered the above serial number into the Police Information Network for inquiry. . . . The system showed the vehicle reported stolen on Sept. 17, 1982 at the Greensboro Police Dept. in Greensboro, N.C. . . .

State v. Craver

[T]he owner of the vehicle [is] Hubert V. & Audrey L. Simmons.

[1] The defendant first contends that the trial court erred in denying his motion to suppress evidence acquired under the search warrant. In order for a valid search warrant to issue, the issuing official must find the existence of probable cause. G.S. 15A-245. Probable cause for the issuance of a search warrant is satisfied when the applicant can show reason to believe that contraband or illegal activity exists in the specified place to be searched. *State v. McLeod*, 36 N.C. App. 469, 244 S.E. 2d 716, *disc. rev. denied*, 295 N.C. 555, 248 S.E. 2d 733 (1978). In addition, if an unidentified informant has supplied all or part of the information contained in the affidavit supplementing the application for a search warrant, some of the underlying facts and circumstances which show the informant is credible or that the information is reliable must be set forth before the issuing officer. *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976); see also *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). The standard for determining probable cause for issuance of a search warrant based on information from informants is "the totality of the circumstances analysis that traditionally has informed probable cause determinations." *Illinois v. Gates*, 462 U.S. 213, ---, 103 S.Ct. 2317, 2332, 76 L.Ed. 2d 527, 548, *reh'g denied*, --- U.S. ---, 104 S.Ct. 33, 77 L.Ed. 2d 1453 (1983); *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984).

The "totality of the circumstances analysis" which mandates a "practical, common sense" determination of probable cause leads us to believe that there was sufficient evidence of the presence of illegal activity as the informant indicated to support issuance of the warrant. The affidavit stated that the informant was known by the affiant personally and had given information in the past which he had always found to be true; the defendant had been arrested for possession of a Cadillac body and Corvette with serial numbers removed; the informant saw in the described building a Cadillac within the past three days; he saw the same frame at another location having a motor put in it; he advised the affiant that the defendant had a red stolen Cadillac in the building with a specified serial number which had been disassembled, and parts of which were in three places in the building;

State v. Craver

some citizen informants saw the defendant move two Cadillac frames into the building and some other car frames, and observed entry by the defendant at irregular hours, late at night and early morning; and a police information network check of the serial number supplied by the confidential informant revealed that the Cadillac was a stolen vehicle. The affidavit is replete with underlying circumstances from which probable cause to believe illegal activity existed could be found. Considering the totality of the circumstances analysis set forth in *Gates* and adopted in North Carolina in *Arrington*, the trial court correctly denied defendant's motion to suppress.

[2] Defendant next contends the trial judge erred in denying defendant's motion to be tried under the provisions of G.S. 20-106 rather than G.S. 14-71.1. The elements of a violation of G.S. 14-71.1 are: (1) possession of personal property, (2) which has been stolen, (3) the possessor knowing or having reasonable grounds to believe the property was stolen, and (4) the possessor acting with a dishonest purpose. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982); *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981). The elements of a violation of G.S. 20-106 are: (1) possession of a vehicle, and (2) the possessor knowing or having reason to believe the vehicle has been stolen or unlawfully taken. *State v. Murchinson*, 39 N.C. App. 163, 249 S.E. 2d 871 (1978).

In this case, the automobile had been disassembled, and it was no longer a "device in, upon, or by which any person or property is or may be transported or drawn upon a highway" G.S. 20-4.01(49). The evidence included the discovery of a Cadillac frame, engine, and transmission having serial numbers which matched the serial numbers of the Simmons' stolen Cadillac, along with the discovery of Audrey Simmons' parking permit. Various reddish-maroon Cadillac parts were found elsewhere in the building, and a reddish-colored body of a Cadillac was discovered suspended from a chain hoist. The disassembly of the vehicle under the facts of this case is evidence of a violation of G.S. 14-71.1. This assignment of error is overruled.

[3] By his next assignment of error, defendant contends the trial court erred in denying his motion for appropriate relief. Judgment was entered against defendant on Wednesday, 3 August 1983. He gave notice of appeal on the same day. On Monday, 15

State v. Craver

August 1983, defendant filed his motion for appropriate relief. The trial court denied the motion on two grounds: (1) that the motion was filed more than ten days after the entry of judgment; and (2) that the case had been appealed to the Court of Appeals, and the superior court no longer had jurisdiction. Clearly the trial judge erred in both his reasons for denial of the motion. Excluding Saturday and Sunday between the date of entry of judgment and the date of filing the motion for appropriate relief, the motion was filed within the ten day period of G.S. 15A-1414(a). And G.S. 15A-1414(c) provides that the motion may be made and acted upon in the trial court whether or not notice of appeal has been given.

Although we find the grounds for denying the motion for appropriate relief to be in error, we conclude such error to be harmless. If there has been no ruling by the trial judge in a motion for appropriate relief within ten days after motion for such relief has been made, the motion shall be deemed denied. G.S. 15A-1448(a)(4). We have addressed defendant's motion in this appeal and conclude that he received a fair trial free of prejudicial error.

[4] Defendant next contends the court erred in denying the defendant's motion to disclose the identity of the confidential informant, alleging that such disclosure was essential to a fair determination of his cause of action and to his defense. The privilege of allowing the identity of an informant to remain confidential is not absolute. When an accused can show that disclosure is essential to a fair determination of defendant's rights under the Fourth and Fifth Amendments, nondisclosure is rendered erroneous. *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957); see also G.S. 15A-978(b). This the defendant has failed to do. Therefore, since the search was made on the basis of a search warrant showing probable cause and the informant did not participate in and was not a material witness to the crime, the court did not err in denying defendant's motion to disclose the informant's identity. G.S. 15A-978(b)(1); *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975). This assignment of error is overruled.

We have reviewed defendant's remaining assignments of error and find them to be without merit. Defendant received a fair trial, free of prejudicial error.

State v. Woodruff

No error.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA v. PAUL WOODRUFF, JR.

No. 8322SC1173

(Filed 2 October 1984)

1. Kidnapping § 1.3— instructions different from indictment—error not objected to—no prejudice

Where the State charged defendant with kidnapping by removing the victim "to facilitate flight following the commission of a felony," the trial court erred in permitting the jury to convict upon finding that defendant removed the victim for the purpose of holding her as a hostage; however, defendant failed to make timely objections to the jury instructions as required by Rule 10(b)(2) of the N.C. Rules of Appellate Procedure, and the trial court's error was not so grievous as to justify the discretionary suspension of Rule 10(b)(2) by the court on appeal.

2. Criminal Law § 35— identity of perpetrator—evidence improperly excluded

In a prosecution of defendant for robbery with a dangerous weapon, felonious auto larceny, felonious breaking and entering, felonious larceny and kidnapping, the trial court erred in refusing to allow defendant to testify that a third person from whom he claimed to have received the stolen goods found in his home matched the victims' physical description of the armed intruder, since the description of the third person was relevant and material to the essential issue of whether defendant was correctly identified as the perpetrator of the crimes, and exclusion of the testimony prevented him from confronting the implications created by the victims' descriptions of the perpetrator.

APPEAL by defendant from *Davis, Judge*. Judgment entered 9 June 1983 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 28 August 1984.

Defendant was tried on bills of indictment charging him with robbery with a dangerous weapon, felonious auto larceny, felonious breaking and entering, felonious larceny, and kidnapping. On 4 December 1980, Tim Lowe returned to his Thomasville residence accompanied by his eleven-year-old son, Todd, and his eight-year-old daughter, Amy. Upon entering the house, Mr. Lowe heard a male voice, turned, and saw his daughter being held at gunpoint by a masked intruder. The gunman said that he was an

State v. Woodruff

escaped convict who had killed before and would kill again. He demanded money and had Todd bring him Mr. Lowe's wallet. Unsatisfied with the amount of money he obtained from inside the house, the gunman ordered Todd to phone Mrs. Lowe, who was at a church choir practice, and tell her that Mr. Lowe had been injured and needed her at home.

Barbara Lowe returned home a short while later, accompanied by a friend, Paula Clodfelter. Shortly thereafter, Butch Clodfelter and Larry Johnson, friends from the church, arrived at the Lowe residence. The gunman took valuables from Mrs. Lowe, Mr. Clodfelter, and Mr. Johnson. Throughout the incident, the intruder held a gun on the Lowes' eight-year-old daughter. He left the house, taking the little girl with him, but returned a few moments later with Mrs. Clodfelter's purse, taken from one of the vehicles outside. Items were taken from the purse. He took the little girl and left the house again, ordering those inside to stay where they were.

The intruder let the child go and escaped in Mr. Clodfelter's car. At trial, the victims described the robber as white, medium build, five foot five inches tall, 140 to 150 pounds, and in his mid-twenties. They testified that a sliding glass door was discovered open in a bedroom and that various items were missing from the house.

The State presented evidence seized from defendant's alleged residence, a mobile home. Items discovered in the trailer matched the descriptions of the stolen items and were positively identified by the victims. Over objection, an undercover police officer testified that the trailer was rented to the defendant, but admitted that the sources of his information were defendant's father and another officer.

Defendant denied all the charges, stating that the items found in the trailer belonged to, or had been purchased from, a friend, Rene Sarratt. His attempts to describe Mr. Sarratt were blocked by the State's objections. Sarratt was later described as matching the victims' description of the intruder, as does defendant. Defendant subpoenaed Sarratt, but the authorities could not locate him to serve the subpoena. The jury found defendant guilty of all charges, and sentences totalling not less than 200 years of imprisonment were imposed.

State v. Woodruff

Attorney General Rufus L. Edmisten, by Associate Attorney Angeline M. Maletto, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in its instructions to the jury on the kidnapping charge because the instructions given allowed the jury to convict on grounds other than those charged in the indictment. We agree with defendant's contention, but hold that in light of the totality of circumstances, defendant was not prejudiced by the error.

Defendant was tried for kidnapping under G.S. 14-39(a) which provides:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

- (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
- (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
- (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.
- (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

The portion of the indictment under which defendant was convicted of kidnapping charged the following:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Paul Woodruff, Jr. . . . did unlawfully, wilfully and feloniously kidnap Amy Lowe, a person under the age of sixteen (16) years, by unlawfully and forcibly confining and restraining

State v. Woodruff

and removing her from one place to another, without the consent of her parents, *for the purpose of facilitating flight of the said Paul Woodruff, Jr., following the commission of a felony, to wit: armed robbery* against the form of the statute in such case made and provided and against the peace and dignity of the State. (Emphasis added.)

The trial judge's instruction to the jury on the kidnapping charge read, in part, as follows:

As to the indictment of kidnapping, I charge that for you to find the defendant guilty of kidnapping the State must prove three things and prove these beyond a reasonable doubt: First, that the defendant unlawfully removed Amy Lowe from one place to another; second, that Amy Lowe had not reached her sixteenth birthday and her parents did not consent to this removal. Consent obtained or induced by fraud or fear is not consent; *third, that the defendant did this for the purpose of holding Amy Lowe as a hostage*. To hold a person as hostage means to hold him as security for the performance or forbearance of some act by a third person. (Emphasis added.)

The judge went on to apply the evidence to the elements he had listed.

A comparison of these excerpts from the indictment and the jury instruction reveals that the trial judge, in the jury instructions, specified a felonious purpose and a theory of conviction that, while enumerated in the statute, were not alleged in the indictment. The State charged defendant with kidnapping "to facilitate flight following the commission of a felony," and therefore the judge was required to instruct the jury on that charge. It was error for him not to do so. "[W]here the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory." *State v. Taylor*, 304 N.C. 249, 275, 283 S.E. 2d 761, 778 (1981).

Ordinarily, such an error would be considered prejudicial and would warrant a new trial. Defendant, however, failed to make timely objections to the jury instructions as required by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. That rule states: "No party may assign as error any portion of the jury

State v. Woodruff

charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. . . ." Defendant was given ample opportunity to object to the jury instructions prior to the beginning of deliberations. He declined to make those objections on at least three occasions. We hold, therefore, that defendant cannot assign as error any portion of the jury instructions. Additionally, the trial court's error was not so grievous as to justify the discretionary suspension of Rule 10(b)(2) as permitted by Rule 2, North Carolina Rules of Appellate Procedure.

[2] Defendant next contends that the trial court erred in refusing to allow defendant to testify that Rene Sarratt, from whom defendant claims to have received the stolen goods, matched the victims' physical description of the armed intruder. He argues that the testimony in question was relevant and material, and that the court's refusal to admit it amounted to a denial of his right to present his defense. We agree and find that the court improperly refused to admit the testimony.

"A defendant may introduce evidence tending to show that someone other than defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party." *State v. Hamlette*, 302 N.C. 490, 501, 276 S.E. 2d 338, 346 (1981). In the case at bar, the excluded evidence points directly to Sarratt and tends to support the conclusion that Sarratt, rather than the defendant, committed the crimes. The description of Sarratt was relevant and material to the essential issue of whether the defendant was correctly identified as the perpetrator of the crimes. It was improperly excluded. Yet, to justify a new trial, the defendant must show that the trial judge's refusal to admit his testimony as to Sarratt's description prejudiced him. *State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981). The defendant contends that the exclusion of the testimony prevented him from confronting the implications created by the victims' descriptions of the perpetrator of the crimes. We agree, and find that this may have seriously disadvantaged the defendant in presenting his defense. We cannot say that if the jury had considered the defendant's excluded testimony it would not have reached a different result. The defendant was prejudiced by the exclusion of Sarratt's description and deserves a new trial on this ground.

Bethea v. McDonald

Finally, defendant contends that the trial court erred in admitting, over objection, hearsay testimony regarding defendant's rental of the trailer in which the stolen items were found, in failing to strike that testimony, and in improperly stating the rental as a fact in the presence of the jury. We find no merit in these contentions. Defendant was not prejudiced in any way by these actions because he subsequently offered the same evidence by admitting to having rented the trailer, and by failing to object continually to its admission.

New trial.

Judges WHICHARD and EAGLES concur.

LORENZA BETHEA, JR. v. WANDA ALLRED McDONALD

No. 8320DC1184

(Filed 2 October 1984)

1. Appearance § 2— general appearance—in personam jurisdiction

When defendant came into court and answered the charges made against her in the motion requesting that she be held in contempt, she made a general appearance, which conferred jurisdiction over her person to the court, and she thereby waived the defective execution or nonexecution of the procedural requirements contained in G.S. 5A-23.

2. Contempt of Court § 6.2; Divorce and Alimony § 25.12— child custody—visitation—contempt proceeding—insufficiency of evidence

In a civil proceeding in which defendant mother was held in contempt of court for her failure to comply with the terms of visitation in a custody order, evidence was insufficient to support the trial court's findings of fact and conclusions of law that (1) failure of defendant to inform plaintiff of her new address was deliberate, intentional and calculated to deprive plaintiff of communication with the child and that (2) the refusal of defendant to permit the child to visit with plaintiff when a request was made by his mother as his agent was deliberate, intentional and contemptuous.

3. Contempt of Court § 7— civil contempt proceeding—punishment for criminal contempt—order vacated

An order in a civil proceeding finding defendant in contempt for failure to comply with the terms of visitation in a custody order must be vacated because it failed to specify as required by G.S. 5A-22(a) how defendant might purge herself of contempt, and the court, in ordering defendant jailed for 30

Bethea v. McDonald

days without stating what action she could take to secure her release, wrongfully applied a criminal contempt punishment in a civil contempt proceeding.

APPEAL by defendant from *Honeycutt, Judge*. Order entered on 29 August 1983 in District Court, RICHMOND County. Heard in the Court of Appeals on 19 September 1984.

No counsel contra.

Lumbee River Legal Services, Inc., by William L. Davis, III, for defendant appellant.

BRASWELL, Judge.

For her failure to comply with the terms of visitation in a custody order, the defendant-mother in a civil proceeding was held in contempt of court and ordered into the Richmond County Jail for thirty days. The defendant on appeal contends that the trial court did not possess *in personam* jurisdiction over her to enter such a contempt order and that the findings of fact and conclusions of law within the contempt order are not supported by the evidence.

The plaintiff-father and defendant-mother are the parents of a minor child born out of wedlock. On 7 May 1981, while the defendant was in jail for an unrelated matter, the plaintiff sued for custody of the child. The defendant answered and counterclaimed for custody. In an order entered 15 April 1982, the defendant was found to be a fit and proper person and awarded custody of the child. The plaintiff was awarded reasonable visitation rights including:

- b. That the Plaintiff shall have the minor child for three weeks during the Summer, such time to be mutually agreed upon by the parties.

On 12 August 1983 the plaintiff instituted the present proceeding by filing a "Motion to Cite Defendant for Contempt of Court." This motion was accompanied by a notice, signed by the plaintiff's attorney, stating that the plaintiff would go forward with his motion on 29 August 1983. All the parties and their counsel appeared for the hearing.

Bethea v. McDonald

From the record the evidence presented by the plaintiff through the testimony of his mother, Annie Mae Bethea, indicated that in July of 1983 she wrote a letter to the defendant asking her to let the child visit her son for three weeks in the summer. This letter was returned to her marked address unknown. At the Clerk of Court's office, the plaintiff's mother was told the defendant's current Raleigh address. She went to visit the defendant and told her that she wanted to get the child for the three weeks' visitation. The defendant replied that she could not get the child ready to go that day but that he could go with her next week. Ms. Bethea returned to her home in Rockingham, but the defendant did not bring the child. She further stated that the plaintiff had not visited his child since the custody order was entered.

The defendant similarly testified that since the 1982 custody proceedings she has not heard from the plaintiff nor has he visited the child. She explained that her address had changed because she had gotten married and had moved. The defendant further testified that when Ms. Bethea came by to ask if the child could come visit for the next three weeks she explained that she needed time to clean his clothes and to prepare his things. The defendant told Ms. Bethea to come back in a week and pick him up. Ms. Bethea did not return for the child.

[1] In her first assignment of error, the defendant contends that because the procedural requirements of G.S. 5A-23(a) were not followed the trial court was not entitled to exercise jurisdiction over her. G.S. 5A-23(a) states in pertinent part that:

Proceedings for civil contempt are either by the order of a judicial official . . . or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and show cause why he should not be held in contempt. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

In the present case, the plaintiff's motion instigating the civil contempt proceedings was not accompanied by a sworn statement or affidavit. Secondly, no order or notice by a judicial official di-

Bethea v. McDonald

recting the defendant to appear and show cause why she should not be held in civil contempt was ever issued or served upon her. Despite these procedural defects, the defendant appeared in court on the scheduled date and participated in the contempt proceedings. We hold that the defendant's actions constituted a general appearance which conferred jurisdiction over her person to the court.

The North Carolina rule for determining what constitutes a general appearance has been well defined. The defendant's appearance must be for a purpose in the cause, not one merely collateral to it. The party must have asked or received some relief in the case or participated in some step taken in it. Essentially, the test of whether the defendant has made a general appearance is whether she became an actor in the cause. *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E. 2d 25, 27 (1980). See also *Hall v. Hall*, 65 N.C. App. 797, 800, 310 S.E. 2d 378, 381 (1984). Thus, when the defendant came into court and answered the charges made against her in the motion requesting that she be held in contempt she made a general appearance. "[I]t has long been the rule in this jurisdiction that a general appearance . . . will dispense with process and service." *Williams v. Williams, supra*. Therefore, through her general appearance, the defendant has waived the defective execution or nonexecution of the procedural requirements contained in G.S. 5A-23. See also *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 583, 273 S.E. 2d 247, 260 (1981); *reversed in part on other grounds*, 309 N.C. 695, 309 S.E. 2d 193 (1983).

[2] The defendant's second assignment of error asserts that the evidence presented was insufficient to support the trial court's findings of fact and conclusions of law. From our review of the evidence and the order, we must agree. In a mixture of facts and conclusions of law, the trial court found the facts as follows:

6. The failure of the defendant to notify or inform the plaintiff of the new address at which she was keeping the child was deliberate, intentional and calculated to deprive the plaintiff of communication with the child.

7. The refusal of the defendant to permit the child to visit with the plaintiff when the request was made by Annie Bethea as agent of the plaintiff approximately four weeks before school began was deliberate, intentional, and contemp-

Bethea v. McDonald

tuous of the order of the Court which was entered on April 15, 1982.

We hold that these conclusions and findings are unsupported by the evidence. Contrary to Finding of Fact No. 6, there was no evidence presented that the defendant's failure to notify the plaintiff of her address change was a deliberate and calculated attempt to prevent the plaintiff from contacting his child. The uncontroverted evidence does show on the other hand that as of July 1983 the plaintiff had not tried to visit his child since the entry of the April 1982 custody order. We also think it important to note that the custody order did not require the defendant to notify the plaintiff concerning her address changes and therefore was not in violation of the order by failing to do so. With no such requirement placed on the defendant in the order, the plaintiff had a responsibility of his own to keep informed of his child's residence.

Similarly, Finding of Fact No. 7 was not supported by the evidence. This finding states that the defendant deliberately and contemptuously refused to permit the child to visit his father. The order, however, states that the plaintiff shall have the child for a period of three weeks in the summer "mutually agreed upon by the parties." The evidence again shows that when Ms. Bethea arrived unexpectedly and wished to take the child immediately, it was not mutually agreeable. The evidence further shows that the defendant was willing to allow the child to visit if she could have sufficient time to prepare his clothes and things for the visit. Although the parties' stories differed as to whether the child would be picked up in Raleigh or carried to Rockingham, there was no evidence that this mishap occurred intentionally or deliberately on the part of the defendant for the purpose of undermining the visitation rights of the plaintiff.

[3] Furthermore, the contempt order must be vacated because it fails to specify as required by G.S. 5A-22(a) how the defendant might purge herself of contempt. The purpose of civil contempt is not to punish, but to coerce the defendant to comply with the order. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). Thus the purging provision is essential to the order. By ordering the defendant jailed for thirty days and by failing to state what action she could take to secure her release, the trial court

In re Huggins v. Precision Concrete Forming

wrongfully applied a criminal contempt punishment in a civil contempt proceeding. Because the evidence does not support the findings of fact and conclusions of law and because the trial judge failed to comply with the mandate of G.S. 5A-22(a), we hold that the order holding the defendant in contempt must be

Reversed.

Judges WEBB and EAGLES concur.

IN THE MATTER OF: TONY R. HUGGINS, 322 MAYFLOWER STREET, CRAMERTON, NORTH CAROLINA 28032, S.S. No. 244-92-2655, APPELLANT v. PRECISION CONCRETE FORMING, POST OFFICE BOX 25786, CHARLOTTE, NORTH CAROLINA 28042, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, POST OFFICE BOX 25903, RALEIGH, NORTH CAROLINA 27611, DOCKET NO. 83(G)2446, APPELLEES

No. 8327SC1274

(Filed 2 October 1984)

Master and Servant § 111.1— unemployment compensation— voluntary resignation attributable to employer—travel—insufficiency of Commission's findings

In an action to recover unemployment compensation where claimant contended that he left his job because he could no longer afford to travel with the company and his voluntary resignation was thus attributable to the employer, the Employment Security Commission's finding that "The employer in this case did not violate any agreement of hire with the claimant" was inadequate to resolve the controversy as to travel arrangements and the responsibilities and actions of both parties in regard to those arrangements.

APPEAL by claimant from *Friday, Judge*. Judgment entered 4 October 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 25 September 1984.

This is an appeal from an order of the Superior Court affirming the Employment Security Commission's denial of claimant's application for unemployment benefits. The record discloses the following:

Tony R. Huggins, claimant, was hired by Precision Concrete Forming as a form carpenter in March 1982. On 15 February 1983 claimant resigned from his job, filing an initial claim for unemployment benefits. On 28 February 1983 claimant's request

In re Huggins v. Precision Concrete Forming

for benefits was denied based on the claims adjudicator's determination that Mr. Huggins' voluntary resignation was "without good cause attributable to the employer." See N.C. Gen. Stat. Sec. 96-14(1). Claimant appealed the decision, and an appeals referee, after an evidentiary hearing, made the following pertinent findings and conclusions:

2. Claimant left this job because he could no longer afford to travel with the company.

3. This claimant was employed as a carpenter and was hired on a local job.

4. When this job was completed the claimant was assigned work out of town and agreed to go out of town. Claimant worked about 3 months and quit because he found it was uneconomical due to his expenses.

5. The employer in this case did not violate any agreement of hire with the claimant.

. . .

In this case, the record evidence and facts found therefrom do not support a conclusion that the claimant has met the burden of showing good cause attributable to the employer for the voluntary leaving. [Citations omitted.] Claimant must, therefore, be disqualified for benefits.

Mr. Huggins sought review of the decision of the appeals referee by the Employment Security Commission. On 22 July 1983 the Commission affirmed the ruling of the appeals referee, "adopt[ing] said decision as its own." Claimant appealed to this Court from an order of the Superior Court affirming the decision of the Commission.

Legal Services of Southern Piedmont, Inc., by Pamela A. Hunter, for claimant, appellant.

Donald R. Teeter, Staff Attorney, for the Employment Security Commission of North Carolina, appellee.

HEDRICK, Judge.

The standard of review by which we are guided in examining the action of the Employment Security Commission is set out in

In re Huggins v. Precision Concrete Forming

N.C. Gen. Stat. Sec. 96-15(i) (Cum. Supp. 1983): "In any judicial proceeding under this section, the findings of the Commission as to the facts, if there is evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law." In *In re Baptist Children's Homes v. Employment Security Comm.*, 56 N.C. App. 781, 290 S.E. 2d 402 (1982), this Court said:

The scope of judicial review of appeals from decisions of the Employment Security Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law.

Id. at 783, 290 S.E. 2d at 403.

In his first two assignments of error, claimant challenges the Commission's conclusion that claimant left work voluntarily without good cause attributable to the employer. Mr. Huggins contends that all the evidence shows that his resignation was attributable to his employer's failure to provide "regular, timely compensation for travel," with the "resulting burden of the costs of transportation" being placed on claimant. Claimant contends that, even if we do not hold the Commission's decision to be erroneous as a matter of law, this Court should remand the matter for additional findings of fact and conclusions of law.

N.C. Gen. Stat. Sec. 96-14(1) provides that an individual shall be disqualified for unemployment benefits if the individual is unemployed "because he left work voluntarily without good cause attributable to the employer." "Good cause" has been defined by our Supreme Court in a related context as a cause which "would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *In re Watson*, 273 N.C. 629, 635, 161 S.E. 2d 1, 7 (1968). This Court has said a cause is "attributable to the employer" under the statute if it is "produced, caused, created or as a result of actions by the employer." *In re Vinson*, 42 N.C. App. 28, 31, 255 S.E. 2d 644, 646 (1979). The claimant has the burden of proving he is not disqualified from receiving benefits. *In re Steelman*, 219 N.C. 306, 13 S.E. 2d 544 (1941).

The sole point of contention between the parties at the hearing before the Commission was simply whether the claimant

In re Huggins v. Precision Concrete Forming

voluntarily left work for good cause attributable to the employer. On appeal, the claimant contends the Commission did not make sufficient findings of fact to resolve this critical question. The entire controversy between the parties arose out of the claimant's having to travel out of town in connection with his employment. The evidence adduced at the hearing was and is confusing and contradictory as to just what arrangements Mr. Huggins had with his employer with respect to out-of-town travel expenses and overnight lodging. The evidence tends to show that the employer agreed with claimant that it would pay overnight lodging expenses when such lodging was necessary because of out-of-town job requirements. The evidence also tends to show that the employer sometimes provided claimant free transportation to and from out-of-town jobs, and that the employer agreed to reimburse Mr. Huggins at the rate of six dollars a day if he made his own travel arrangements with other employees.

The Commission's finding of fact with respect to evidence regarding travel to and from out-of-town jobs as related to the claimant is: "Claimant left this job because he could no longer afford to travel with the company." Claimant does not challenge this finding of fact; indeed, he agrees that this was precisely the reason he voluntarily left work. Mr. Huggins does contend, however, that this undisputed finding does not support the Commission's conclusion that he resigned "without good cause attributable to the employer."

Whether claimant's inability to afford continued out-of-town employment constitutes "good cause attributable to the employer" for his resignation requires resolution of the critical question whether his financial difficulties were caused by the employer's noncompliance with its agreement concerning reimbursement for travel expenditures or by claimant's own fault. Claimant introduced evidence tending to show that the employer promised to reimburse him for travel expenses at a rate of six dollars a day, that the employer did not promptly and fully reimburse him, that he was consequently unable to satisfy his obligation to the driver of the vehicle in which he had been commuting to work, and that the driver refused to provide continued transportation until claimant satisfied his debt. The employer, on the other hand, offered evidence tending to show that it offered claimant free transportation to out-of-town job sites, and that

Lee v. State Farm Fire and Casualty Co.

claimant failed to take advantage of this offer. The record thus discloses a controversy as to travel arrangements and the responsibilities and actions of both parties in regard to those arrangements. Examination of the findings of fact made by the Commission, however, reveals only one finding relating to this controversy between the parties: "The employer in this case did not violate any agreement of hire with the claimant." We hold this sole conclusory finding woefully inadequate to resolve the matters at issue in the proceeding before the Commission. This finding leaves unanswered the ultimate question whether claimant voluntarily left work without good cause attributable to the employer. Thus the order of the Superior Court affirming the decision of the Employment Security Commission must be vacated and the cause remanded to that court for the entry of an order of remand to the Employment Security Commission to make findings of fact and conclusions of law resolving the critical question whether the employee voluntarily left work without good cause attributable to the employer.

Vacated and remanded.

Judges BECTON and PHILLIPS concur.

JOHN D. LEE v. STATE FARM FIRE AND CASUALTY COMPANY

No. 8311SC1237

(Filed 2 October 1984)

Insurance §§ 122, 136— summary judgment—requirements of policy

In an action on a fire insurance policy, summary judgment was not proper where there were genuine issues of material fact concerning whether plaintiff complied with the provisions of the policy, and where it was not clear as a matter of law that the parties intended for the production of plaintiff's tax returns if and when requested to be a condition precedent to plaintiff's right to collect under the policy.

Judge WELLS concurring in result.

APPEAL by plaintiff from *Bowen, Judge and Bailey, Judge*. Judgment entered 20 July 1983 in Superior Court, HARNETT County. Heard in the Court of Appeals 20 September 1984.

Lee v. State Farm Fire and Casualty Co.

Plaintiff instituted this action to recover damages from loss by fire of his dwelling house and personal property covered by an insurance policy issued by defendant. Defendant denied liability pleading arson and breach of the policy provisions as a defense. Plaintiff filed a motion for summary judgment which was denied by the superior court, Judge Bowen presiding, by order entered 8 October 1981. Subsequently, defendant filed a motion for summary judgment. On 20 July 1983, the superior court, Judge Bailey presiding, allowed defendant's motion and entered summary judgment for defendant. Plaintiff appealed.

O. Henry Willis, Jr., for plaintiff appellant.

Anderson, Broadfoot, Anderson, Johnson and Anderson, by Henry L. Anderson, Jr., for defendant appellee.

HILL, Judge.

The question presented by this appeal is whether summary judgment was properly entered for defendant. Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). An issue is genuine if it "may be maintained by substantial evidence." *City of Thomasville v. Lease-A-fex, Inc.*, 300 N.C. 651, 268 S.E. 2d 190 (1980); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

The evidence in this case shows that the insurance policy under which plaintiff seeks to recover contains the following provision:

The insured, as often as may be reasonably required, shall . . . submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Lee v. State Farm Fire and Casualty Co.

The policy further provides that no suit or action on the policy for the recovery of any claim may be maintained unless all the requirements of the policy have been met.

Pursuant to these provisions of the policy, plaintiff submitted to two examinations under oath. During both examinations, plaintiff repeatedly refused to produce his federal and state tax returns or execute a release whereby defendant could obtain the tax returns. Plaintiff also refused to produce his banking and other financial records and refused to answer various questions concerning his income, his banking history, and his ownership of stocks and bonds. However, at the second examination, plaintiff agreed to execute and apparently did so execute a release authorizing the banks and other lending institutions with whom he had done business to consult with and/or deliver to defendant any and all records requested by it.

In addition at the first examination, plaintiff indicated he would not sign the transcript of the examination when the time came for him to do so. However, it became apparent during the examination that plaintiff did not know how to read. Near the end of the examination, plaintiff stated he would sign the transcript if the court reporter read it to him but not if defendant's attorney read it to him as he did not trust defendant's attorney. Neither examination was in fact ever signed by plaintiff. However, there is nothing in the record to indicate that defendant, who received possession of the transcripts of the examinations after they were prepared, ever presented the transcripts to the plaintiff for his signature.

Defendant based its motion for summary judgment on the grounds "that there exists no genuine issue as to any material fact herein related to the failure of the plaintiff to provide the defendant Federal and North Carolina tax returns as requested and that plaintiff is entitled to a Judgment as a matter of law." In support of its motion, defendant submitted the transcripts of the two examinations under oath taken of plaintiff. Plaintiff filed a response opposing the motion supported by his personal affidavit in which he averred that he never had tax returns for the years in question because he did not file returns for those years, and that defendant's request that plaintiff produce the tax returns was improper in that tax returns are not

Lee v. State Farm Fire and Casualty Co.

"books of account, bills, invoices and other vouchers" and therefore were not within contemplation of the contract. After considering the examinations under oath, the pleadings, and arguments of counsel, Judge Bailey granted defendant's motion for summary judgment on the grounds that:

there is no material or genuine issue of fact with regard to the Plaintiff's failure to "subscribe" the examination under oath herein involved, failure to "produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost" and failure to execute releases tendered for the release of Federal and State tax returns, in direct violation of the contractual provisions herein involved, said obligations being a condition precedent to the filing and institution of the suit herein involved; . . .

Plaintiff argues the court erred in entering summary judgment for defendant in that there were numerous material issues of fact relating to whether plaintiff complied with the terms of the insurance policy regarding the examinations under oath and the production of documents. Since the insurance policy clearly requires compliance with all of its requirements in order for plaintiff to maintain this action, plaintiff's failure to comply with any one of the conditions set forth in the summary judgment order as a matter of law would be sufficient grounds for upholding the order.

After carefully reviewing the pleadings, the examinations under oath, and the briefs of the parties, we conclude that it is not clear as a matter of law that plaintiff failed to comply with any of the conditions or requirements of the policy. We believe there is sufficient evidence to show that there are genuine issues of material fact concerning whether plaintiff complied with the provisions of the policy including whether plaintiff refused to subscribe the examinations in violation of the policy; whether plaintiff's refusal to produce for examination his banking and other financial records constituted a material breach of the policy in light of his later execution of the release enabling defendant to obtain any and all of plaintiff's bank records, and whether plaintiff failed to comply with the provisions of the policy by failing to produce the tax returns requested by defendant particularly in light of the fact that plaintiff stated he had no such tax returns

State v. Kornegay

because he had not filed returns for those years. In connection with the latter issue, we do not believe it is clear as a matter of law that the parties intended for the production of plaintiff's tax returns if and when requested to be a condition precedent to plaintiff's right to collect under the policy. For these reasons, we hold the superior court erred in entering summary judgment for defendant and that the judgment must be reversed.

Plaintiff also assigns as error on appeal the denial of his motion for summary judgment. Because there are genuine issues of material fact presented by this action as just described, the denial of plaintiff's motion was correct.

Reversed.

Judge ARNOLD concurs.

Judge WELLS concurs in the result.

Judge WELLS concurring in result.

I concur in the result, but would hold that as a matter of law neither bank account records nor income tax returns are "books of account, bills, invoices, and other vouchers" under plaintiff's insurance policy.

STATE OF NORTH CAROLINA v. RICKY LEWIS KORNEGAY

No. 8314SC1311

(Filed 2 October 1984)

1. Criminal Law § 101.2— probation officer in courtroom—conversation with juror—no effect on deliberations

The jury's deliberations were not affected and defendant was not entitled to a mistrial where one of the jurors was personally acquainted with defendant's probation officer who was present in the courtroom; at the close of the evidence the juror asked the probation officer if she were connected with the case; she responded that she was defendant's probation officer; defendant had not taken the stand and his criminal record was not before the jury; by implication the information was repeated when the judge asked the other jurors whether any of them had heard the conversation with "the probation officer";

State v. Kornegay

and the court examined the jurors to determine whether the conversation would affect their deliberations and was satisfied that it would not.

2. Criminal Law § 138.6— escape during trial—aggravating factor

Defendant's escape from the courtroom after the verdict but prior to sentencing was relevant evidence for the court to consider in sentencing pursuant to the Fair Sentencing Act. G.S. 15A-1340.4.

3. Criminal Law § 138.6— caution to avoid bodily harm—no mitigating factor

In a prosecution of defendant for felonious breaking or entering and felonious larceny, there was no merit to defendant's contention that his caution to avoid causing bodily harm—in essence, his decision to commit larceny rather than robbery—should have been found as a mitigating factor, since the mitigating factor of G.S. 15A-1340.4(a)(2)(j) is available only when a defendant exercises caution to prevent or cannot reasonably foresee harm that actually occurs, but defendant in this case sought to mitigate crimes he committed against property with evidence of further crimes he could have committed against persons.

APPEAL by defendant from *McLelland, Judge* (trial), and *Barnette, Judge* (sentencing). Judgments entered 23 August 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 19 September 1984.

Defendant appeals from judgments of imprisonment entered upon a jury verdict finding him guilty of five counts each of felonious breaking or entering and felonious larceny.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgett, for the State.

J. Randolph Ward for defendant appellant.

WHICHARD, Judge.

Defendant raises three questions: whether denial of his motion for mistrial based on prejudicial taint of the jury is reversible error; whether his escape from custody after the verdict but prior to sentencing constitutes a permissible aggravating factor under the Fair Sentencing Act; and whether his caution to avoid causing bodily harm—in essence, his decision to commit larceny rather than robbery—should have been found as a mitigating factor. We find no error.

I.

[1] As a general rule, the grant or denial of a motion for mistrial in non-capital cases is in the sound discretion of the trial court.

State v. Kornegay

State v. Battle, 267 N.C. 513, 518, 148 S.E. 2d 599, 602 (1966). The court's order is not reviewable except for gross abuse of discretion, and the burden is on defendant to show such abuse. *Id.*

In this case, one of the jurors was personally acquainted with defendant's probation officer, who was present in the courtroom. At the close of the evidence, the juror asked the probation officer if she were connected with this case; she responded that she was defendant's probation officer. Defendant had not taken the stand and his criminal record was not before the jury. By implication the information was repeated when the judge asked the other jurors whether any of them had heard the conversation with "the probation officer."

Defendant argues that any information reaching the jury bearing on his character or propensity for crime could reasonably be expected to influence the jury's decision. He cites *State v. Johnson*, 295 N.C. 227, 244 S.E. 2d 391 (1978) in support of his position. The test, as stated in *Johnson*, is as follows:

[N]either the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third person *unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial.*

Id. at 234, 244 S.E. 2d at 396.

Here the court questioned the jury as to its knowledge of the conversation. It examined the jurors to determine whether the conversation would affect their deliberations and was satisfied that it would not. The record contains no basis for disturbing the exercise of the court's discretion in finding that the jury's deliberations would not be affected and in thus denying the motion for mistrial.

II.

[2] Defendant contends that his escape from the courtroom, after the verdict but prior to sentencing, was not transactionally related to the crimes for which he was being sentenced and therefore cannot be considered as an aggravating factor under

State v. Kornegay

the Fair Sentencing Act. This Court faced a similar situation in *State v. Rotenberry*, 54 N.C. App. 504, 284 S.E. 2d 197 (1981), a pre-Fair Sentencing Act case. There defendant argued that evidence of his escape on the day of his probable cause hearing was irrelevant and prejudiced the sentencing court against him. The Court held otherwise, stating: "Defendant's escape pending his trial was clearly relevant evidence for the court to consider at the sentencing hearing." *Id.* at 512, 284 S.E. 2d at 202.

In light of two recent decisions, defendant's escape during trial was also relevant evidence for the court to consider in sentencing pursuant to the Fair Sentencing Act. That act provides that the court "may consider any aggravating . . . factors that . . . are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing" G.S. 15A-1340.4. Our Supreme Court recently held that a defendant's perjury during trial is reasonably related to the purposes of sentencing and, when proven by a preponderance of the evidence, may serve as a non-statutory aggravating factor which warrants a more severe sentence. *State v. Thompson*, 310 N.C. 209, 311 S.E. 2d 866 (1984). It stated:

[T]he character of the defendant, his conduct, and particularly that conduct as it reflects his attitude toward society and its laws, are relevant considerations for a trial judge in determining what sentence [is] to be imposed. Perjury at trial often indicates a defendant's continued defiance of society's system of laws and to that extent reflects on his potential for rehabilitation and is thus 'reasonably related to the purposes of sentencing.'

Id. at 222, 311 S.E. 2d at 873. The Supreme Court also stated recently, in upholding a statutory aggravating factor: "One demonstrates disdain for the law by committing an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating circumstance." *State v. Webb*, 309 N.C. 549, 559, 308 S.E. 2d 252, 258 (1983).

The reasoning of these decisions indicates that defendant's escape during trial could be considered as an aggravating factor in sentencing. An escape during trial, like perjury, "indicates a defendant's continued defiance of society's system of laws and to that extent reflects on his potential for rehabilitation and is thus

State v. Kornegay

'reasonably related to the purposes of sentencing.'" *Thompson, supra*. The escape, committed while on trial for an earlier offense, also demonstrates disdain for the law. *Webb, supra*.

The evidence that the escape occurred is uncontroverted. The test of proof by the preponderance of the evidence thus has been met. Pursuant to the reasoning of *Thompson* and *Webb*, we hold that the factor in question was reasonably related to the purposes of sentencing. The court thus properly could consider it.

III.

[3] Defendant contends the court should have found that his care to avoid causing bodily injury or fear constituted a mitigating factor. He presented evidence at the sentencing hearing that he and his cohort

took pains to avoid contact with other persons and otherwise avoided violence while committing these crimes, which involved taking television sets from motel rooms. Specifically, that they carried no weapons and used no instrumentality [sic] in a manner threatening harm to persons; that they approached only motel rooms that appeared to be unoccupied, knocked before forcing entry, and if there was a response to the knock, fled.

The statutory mitigating factor defendant relies upon reads: "The defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences." G.S. 15A-1340.4 (a)(2)(j).

This mitigating factor is available only when a defendant exercises caution to prevent or cannot reasonably foresee harm that *actually occurs*. See, e.g., *State v. Benbow*, 309 N.C. 538, 545-46, 308 S.E. 2d 647, 652 (1983); *State v. Jones*, 309 N.C. 214, 221-22, 306 S.E. 2d 451, 456 (1983); *State v. Puckett*, 66 N.C. App. 600, 607, 312 S.E. 2d 207, 211-12 (1984). Defendant in effect seeks to mitigate crimes he committed against property with evidence of further crimes he could have committed against persons. The statutory factor in question was not designed to benefit an offender who merely chooses to commit lesser crimes when greater ones are within his grasp. The argument is ingenious but obviously without merit.

State v. Woods

No error.

Chief Judge VAUGHN and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. BEVERLY ANN WOODS

No. 833SC1277

(Filed 2 October 1984)

Parent and Child § 2.2— child abuse—sufficiency of evidence

The evidence was not sufficient to establish a violation of G.S. 14-318.2(a) by allowing physical injury to be inflicted upon defendant's child when it showed that defendant, although present in the mobile home at the time of the incident, was not present in the room where her husband perpetrated the acts described in the warrant, and that defendant became aware of the abuse of the child only after it had occurred, when her husband told her of his actions. Factors to be considered in determining whether a parent charged with allowing physical injury to be inflicted upon his or her child knew or should have known that injury was being inflicted include: the proximity of the party charged to the place of the incident; his or her opportunity to see, hear, or otherwise become aware of the occurrence; the relationship of all parties involved; the behavioral pattern and history of the parties; and any other relevant fact which might give rise to an inference that the party charged knew or could have known that physical injury was in fact being inflicted on a child.

Judge PHILLIPS concurs in the result only.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 14 April 1983 in Superior Court, CRAVEN County. Heard in the Court of Appeals 18 September 1984.

Defendant was charged with violating N.C. Gen. Stat. Sec. 14-318.2, misdemeanor child abuse, in a warrant containing the following words and phrases:

Offense: Child Abuse

Offense in Violation of G.S.: 14-318.2

Date of Offense: 10/12/82

...

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant unlawfully, willfully being

State v. Woods

a person providing care and supervision because of her relationship as the mother of Jessica Woods, age 2 months, allow Ulysses Woods Jr. to inflict physical injury upon that child by: the defendant was present in the house trailer when Ulysses Woods Jr., the child's father inflicted the injury to her child and did not attempt to stop the father from inflicting the injury. The physical injury inflicted was severe biting of the hands, face, lips and body in violation of the law referenced on this Warrant.

Defendant was found guilty as charged and from a judgment imposing a prison sentence of two years, suspended on certain conditions, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert E. Cansler, for the State.

Beswick, Herring, Graham & Barnhill, by Steven E. Lacy, for defendant, appellant.

HEDRICK, Judge.

Defendant assigns error to the denial of her motions to dismiss, asserting that the evidence was insufficient to permit submission of the case to the jury. The State responds to this assignment of error by merely stating: "The trial court did not err in denying defendant's motion for dismissal at the close of the State's evidence, and at the close of all the evidence, and in denying defendant's motion for appropriate relief requesting judgment notwithstanding the verdict."

When the evidence is considered in the light most favorable to the State, it tends to show the following: Defendant and her husband lived in a mobile home in Havelock, North Carolina, with their infant child Jessica, born on 3 August 1982. On 12 October 1982 defendant was in the back of her home vacuuming, and her husband and child were in the living room. Ten to fifteen minutes after defendant began vacuuming, her husband entered the room and told defendant he had bitten Jessica on the mouth, and that the child's mouth was bleeding. Approximately five minutes later, Mr. Woods left the home, following which defendant called her mother, asking that she come get defendant and Jessica. When defendant's mother, Mrs. Murphy, arrived, she suggested taking

State v. Woods

the infant to a doctor. Mrs. Murphy, defendant, and Jessica then went to the Craven County Hospital emergency room. After arriving at the hospital, the child was examined by Dr. Thomas G. Irons, a pediatrician, who found she had scratches, abrasions, bruises, and scars. Dr. Irons testified that some of the injuries appeared to have been freshly inflicted, while others had been inflicted three weeks or more prior to his examination. X-rays taken of the infant revealed "twist fractures" of the legs, seven fractures of the ribs, and a fractured collarbone. Based on his examination of Jessica, Dr. Irons concluded that her injuries were typical of those associated with "Battered Child Syndrome."

Defendant was interviewed at the hospital by an investigator employed by the Craven County Sheriff's Department, at which time she made a statement recorded by the investigator as follows:

Beverly Ann Woods stated to the undersigned, me, that her husband, Ulysses Woods, Jr., had bitten her daughter, Jessica Woods, age two months, date of birth, August 3rd, 1982, stated that he had been biting the child for the last month. She stated that she didn't know how the child had gotten the bruises on the face, nose and forehead. She stated that he had bitten the child on the lip. She further stated that she was present in the trailer but not in the room when the acts were performed.

At trial defendant testified to prior incidents of abusive conduct by her husband toward Jessica, indicating that her husband first began biting the child on 2 September, approximately a month after the infant's birth. In her testimony defendant identified five instances of abusive conduct prior to 12 October, stating that she and her husband had argued about his behavior and that she had threatened to leave with Jessica if he persisted in injuring the infant.

Our Supreme Court has held that N.C. Gen. Stat. Sec. 14-318.2(a) establishes three separate and distinct offenses: "[T]he parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury." *State v. Fredell*, 283 N.C. 242, 244, 195 S.E. 2d 300, 302 (1973). Defendant in the instant case was charged under

State v. Woods

the second provision of the statute with the single and specific act of allowing her husband to inflict physical injury on the child by biting the child on 12 October 1982, in violation of G.S. 14-318.2.

The record in the present case is devoid of any evidence that defendant allowed her husband on 12 October 1982 to inflict physical injury on the child in the manner described in the warrant. There is no evidence that the defendant knew or should have known that her husband was inflicting injury on Jessica on 12 October 1982 so that she could have stopped or prevented him from doing so. Indeed, all of the evidence discloses that the defendant, although in the mobile home at the time of the incident, was not present in the room where her husband perpetrated the acts described in the warrant, and that she became aware of the abuse of the child only after it had occurred, when her husband told her of his actions. Whether a defendant charged with allowing physical injury to be inflicted on a child under this statute knew or should have known that such injury was in fact being inflicted must be determined by all of the facts and circumstances depicted by the evidence in the particular case. Factors that may be relevant in making this determination include: the proximity of the party charged to the place of the incident; his or her opportunity to see, hear, or otherwise become aware of the occurrence; the relationship of all parties involved; the behavioral pattern and history of the parties; and any other relevant fact which might give rise to an inference that the party charged knew or could have known that physical injury was in fact being inflicted on a child. Applying the foregoing rule to the case before us, we are compelled, albeit reluctantly, to hold that the evidence in this record is not sufficient to raise an inference from which the jury could find beyond a reasonable doubt that the defendant knew or should have known on 12 October 1982 that the father was physically injuring this infant in the manner described in the warrant, and the trial court should have granted defendant's motion to dismiss the charge against her.

We note that the evidence in this case discloses that defendant's husband had repeatedly abused this child during the several weeks prior to 12 October, and that the defendant was aware of this deplorable and dangerous situation but took no effective action to stop or prevent the abuse until 12 October. In our opinion,

Lambe-Young, Inc. v. Cook

the evidence in this record is sufficient for a jury to find beyond a reasonable doubt that the defendant "create[d] or allow[ed] to be created a substantial risk of physical injury, upon or to [her] child by other than accidental means," in violation of the third distinct offense described in G.S. 14-318.2(a). The defendant here, however, was neither charged with nor found guilty of this offense.

Judgment vacated.

Judge BECTON concurs.

Judge PHILLIPS concurs in the result only.

In my opinion the evidence recorded fails to show that defendant violated any provision of G.S. 14-318.2, whether alleged or not. Nothing in the evidence suggests to me that she either allowed, created, or controlled the developments that occurred. The only thing to her discredit that I see in the record is that she married a man who is either a thoughtless fool or a sadistic brute; but the General Assembly has not yet made such marriages a crime, and probably could not do so constitutionally.

LAMBE-YOUNG, INC. v. OLA MAE W. COOK, ADMINISTRATRIX OF THE ESTATE OF
GILBERT BRUCE COOK; AND, OLA MAE W. COOK, INDIVIDUALLY

No. 8321SC1224

(Filed 2 October 1984)

1. Evidence § 11— dead person statute—exception—surviving party has identical interest

Testimony against the representative of a deceased person is not incompetent where a party "associated in the contract and united in interest" with the deceased is still alive. G.S. 8-51.

2. Brokers and Factors § 1.1— contract granting right to sell—latent ambiguity

A contract that granted "exclusive rights to sell the property located at Hwy 421 West, Yadkinville[,] N.C.[,] Yadkin[,] N.C." owned by Ola M. Cook and Gilbert B. Cook was not patently ambiguous, but only latently so; the subject property was clearly capable of identification by reference to extrinsic matters.

Lambe-Young, Inc. v. Cook

3. Contracts § 18— oral modification—burden of proof

The burden of proving modification or waiver is on the party asserting it; further, proof of an oral agreement that modifies a written contract should be by clear and convincing evidence.

4. Brokers and Factors § 6— real estate commission—sale by owner—measure of damages

The trial court did not err by instructing the jury that it should determine general damages by multiplying the percent of commission it found the parties had agreed upon in the contract by the price for which it found defendants sold the warehouse, and that, if the jury found the facts to be as all the evidence tended to show, the amount of general damages would be \$25,000 where the contract provided for a 10% commission and the uncontradicted evidence was that defendants sold the property for \$250,000.

5. Trial § 11— closing argument—refusal to permit defendant to read from a deed admitted and passed among the jury—no prejudice

There was no prejudice from the trial court's refusal to allow defendants' attorney, during closing argument, to read from a deed which had been admitted and passed among the jury; moreover, the portion of the deed in question was irrelevant to the issues being tried.

APPEAL by defendants from *Albright, Judge*. Judgment entered 24 June 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 September 1984.

Defendant Ola Mae Cook, individually and as administratrix of the estate of her deceased husband, appeals from a judgment entered on a jury verdict finding that she and her husband breached their contract with plaintiff and awarding compensatory damages in the sum of \$25,000.

Bell, Davis & Pitt, P.A., by William Kearns Davis and Joseph T. Carruthers, for plaintiff appellee.

Franklin Smith for defendant appellant.

WHICHARD, Judge.

On 4 May 1981 plaintiff, a licensed real-estate broker, entered into a written agreement with defendants husband and wife whereby plaintiff was to have exclusive right to market defendants' warehouse for a period of ninety days. The agreement specified that if the property were sold during the ninety-day period, plaintiff was to receive a commission equal to 10% of the sale price. It further specified a listing price for the property of \$365,000.

Lambe-Young, Inc. v. Cook

On 27 July 1981, within the ninety-day period, defendants conveyed the property to buyers not procured by plaintiff for the sum of \$250,000. Defendants refused to pay plaintiff the commission specified in the Exclusive Sales Contract, contending that plaintiff had orally released them from the written agreement. Defendant-husband died after the sale of the property.

The jury found that the parties did have a contract, that plaintiff had not released defendants from their obligations under the contract, and that plaintiff was entitled to damages for breach in the amount of \$25,000. Defendants appeal from a judgment entered on the verdict.

[1] Defendants contend the court erred in admitting evidence in contravention of the dead person statute, G.S. 8-51. This statute prohibits a party or interested person from testifying in his or her own interest against the administratrix of a deceased person about a personal transaction or communication between the party and the deceased. Defendants specifically object to the admission of: court-ordered interrogatory answers which admit the defendant-husband's signature on the contract with plaintiff; a written contract executed by the defendant-husband and his wife; a deed to the third party buyer executed by the defendant-husband and his wife; and testimony by plaintiff's witnesses concerning transactions with defendants.

A judicially recognized exception to G.S. 8-51 provides that testimony against the representative of a deceased person is not incompetent where a party "associated in the contract and united in interest" with the deceased is still alive. *Peacock v. Stott*, 90 N.C. 518, 520 (1884). The rule is stated by Brandis as follows:

[T]he interested witness may testify if, but only if, there is a surviving party to the transaction whose interests were the same as those of the deceased and who therefore can be relied upon to balance the testimony.

1 H. Brandis, North Carolina Evidence, Sec. 74 at 279.

Plaintiff's transactions were at all times with both the deceased husband and the defendant-wife. Both were present at the initial meeting with plaintiff at the warehouse, both signed the Exclusive Sales Contract prepared by plaintiff, and both signed the deed conveying the property to a buyer. Defendant-

Lambe-Young, Inc. v. Cook

wife appeared and testified, both in her own right and as the administratrix of the estate of her husband. This case therefore does not "come within the mischief which the [dead person statute] was intended to provide against," in that "the evidence of the witness would not be beyond the reach of correction or contradiction." *Peacock v. Stott*, 90 N.C. at 520. We thus hold that the court did not err in admitting the evidence in question.

[2] Defendants contend the court erred in admitting the contract because it "was void for vagueness of description." The contract granted "exclusive rights to sell the property located at Hwy 421 West, Yadkinville[,] N.C.[] Yadkin[,] N.C." owned by Ola M. Cook and Gilbert B. Cook. This description was not patently ambiguous, but only latently so; the subject property was clearly capable of identification by reference to extrinsic matters. See *House v. Stokes*, 66 N.C. App. 636, 311 S.E. 2d 671 (1984); *Bradshaw v. McElroy*, 62 N.C. App. 515, 302 S.E. 2d 908 (1983). The property was in fact fully identified at trial by defendants' introduction of their deed to the purchasers which described the property by metes and bounds. The property subject to the contract was not an issue in the trial. This contention is without merit.

[3] Defendants contend the court erred in charging the jury with respect to the burden of proof on the issue of whether plaintiff released defendants from their obligations under the contract. The court charged that the burden was on defendants to prove by clear and convincing evidence that plaintiff had orally released them from the contract. This accords with North Carolina law. The burden of proving modification or waiver is on the party asserting it. *Insurance Agency v. Leasing Corp.*, 31 N.C. App. 490, 492, 229 S.E. 2d 697, 699 (1976); *Credit Co. v. Jordan*, 5 N.C. App. 249, 253, 168 S.E. 2d 229, 232 (1969). Further, proof of an oral agreement that modifies a written contract should be by clear and convincing evidence. *Tile and Marble Co. v. Construction Co.*, 16 N.C. App. 740, 742, 193 S.E. 2d 338, 340 (1972); *Credit Co. v. Jordan*, 5 N.C. App. at 253, 168 S.E. 2d at 232. We thus find no error in this portion of the charge.

[4] Defendants contend the court erred in charging the jury with respect to damages. The court instructed the jury to determine general damages, if it should reach that issue, by multiplying the percent of commission it found the parties agreed upon in the con-

Lambe-Young, Inc. v. Cook

tract by the price for which it found defendants sold the warehouse. If the jury found the facts to be as all the evidence tended to show, the court stated, the amount of general damages would be \$25,000. The court further instructed that if the jury found no actual damages, it could return a verdict of nominal damages, such as one dollar.

The contract provided: "[Defendants] agree to pay [plaintiff] the agreed-upon commission of ten percent of the sales price upon the sale or transfer of title of the property." The evidence that defendants sold the property for \$250,000 was uncontradicted. The charge thus correctly advised the jury as to the proper method of compensation. See *The Property Shop v. Mountain City Investment Co.*, 56 N.C. App. 644, 652, 290 S.E. 2d 222, 227 (1982) ("when a sale is made by the owner at a price less than the broker is authorized to offer, the commission allowed is the contract rate on the actual sale price"); *Beasley-Kelso Associates v. Tenney*, 30 N.C. App. 708, 719, 228 S.E. 2d 620, 626, *disc. rev. denied*, 291 N.C. 323, 230 S.E. 2d 675 (1976) (computation of commission in manner instructed on here held correct). This contention is without merit.

[5] Defendants finally contend the court erred in refusing to allow their attorney to read to the jury during closing argument a portion of the deed by which they transferred the subject property to the purchasers. When defendants introduced the deed, the court allowed them to pass it among the jurors. We thus perceive no prejudice from the refusal to allow defendants' attorney to read from the deed during closing argument. We also believe the court correctly found the portion in question irrelevant to the issues being tried.

No error.

Chief Judge VAUGHN and Judge BECTON concur.

Tyson v. Carolina Telephone

JOHNNY R. TYSON v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY

No. 833DC1207

(Filed 2 October 1984)

Master and Servant § 8.1; Taxation § 28.5— per diem allowance— additional income tax assessed— employer not negligent

Where the undisputed facts showed that defendant paid plaintiff a standard per diem allowance for business expenses incurred at his many job locations as an unlocated equipment installer, he was never reimbursed by his employer for actual expenses, and following an audit by the IRS he was required to pay additional taxes because his per diem payments for 1979 and 1980 exceeded his legitimate business expenses, plaintiff could not make out a case of negligence against defendant, since his evidence failed to set forth any specific facts that defendant breached any legal duty which proximately caused plaintiff's injury, even if defendant employer did fail to establish and maintain an adequate accounting procedure to make sure that amounts paid out covered but did not exceed ordinary and necessary expenses.

APPEAL by plaintiff from *Wheeler, Judge*. Judgment entered on 6 September 1983 in District Court, PITT County. Heard in the Court of Appeals on 31 August 1984.

James Leon Bullock for plaintiff appellant.

Carolina Telephone and Telegraph Company by Vice President-General Counsel and Secretary Dwight W. Allen for defendant appellee.

BRASWELL, Judge.

Upon being required to pay additional income taxes for the years 1979 and 1980 following an audit by the Internal Revenue Service, plaintiff, an "unlocated equipment installer" employee of the defendant corporation, filed this action alleging that his additional income tax liability resulted solely from the negligence of the defendant. The trial court granted summary judgment for the defendant. Plaintiff appeals. We affirm.

After a reading of the complaint and a study of the affidavits and depositions, we hold that the defendant has carried its burden of establishing the lack of any triable issue of fact. From a forecast of all the evidence it shows that the plaintiff cannot make out a case of negligence against the defendant. The plain-

Tyson v. Carolina Telephone

tiff's evidence fails to set forth any specific facts that the defendant breached any legal duty which proximately caused the plaintiff's injury. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *pet. for rehearing denied*, 281 N.C. 516 (1972); *Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979).

The undisputed facts show that defendant paid the plaintiff a standard per diem allowance for business expenses incurred at his many job locations as an unlocated equipment installer. He was never reimbursed by his employer for actual expenses. Following an audit by the I.R.S., the plaintiff was required to pay additional taxes because his per diem payments for 1979 and 1980 exceeded his legitimate business expenses.

The crux of the plaintiff's negligence action is that the defendant "had a duty to properly and non-negligently determine what would be defined as an adequate accounting to the employer, . . . to prudently and non-negligently inform the employee of what an adequate accounting would be and to provide the necessary forms." The plaintiff alleges that but for the defendant's breach of this duty he would not have been audited, forced to separately substantiate each expense account item, and required to pay additional taxes. According to the tax regulations, reimbursements and allowances received by an employee for expenses he pays or incurs for travel in connection with his employment must be reported as income unless the employee:

- (1) is required to and does make an accounting for his travel and entertainment expenses to his employer;
- (2) does not deduct travel and entertainment expenses on his return; and
- (3) the sum of these expenses equals or exceeds the total amount of allowances and reimbursements.

34 Am. Jur. 2d, *Federal Taxation* Sec. 6923 (1984). However, under the per diem allowance rule, it is unnecessary for an employee to account separately to the I.R.S. or to his employer for travel subsistence, as long as the total travel allowance received does not exceed the traveling expenses paid or incurred by the employee, then the excess must be reported as income. *See generally* Reg. Sec. 1.274-5(f). The employee is considered to have satisfied the adequate accounting requirements if (1) his employer

Tyson v. Carolina Telephone

reasonably limits payments to those subsistence expenses which are ordinary and necessary, and (2) the elements of time, place, and business purpose of travel are substantiated. Rev. Ruling 80-62, 1980-1 C.B. 63. *See also* Rev. Ruling 80-203, 1980-2 C.B. 101. Subsistence includes among other things reasonable travel expenses for meals and lodging. 34 Am. Jur. 2d *supra* at Sec. 6929. Nevertheless, the I.R.S. may determine that the accounting procedures used by an employer for the reporting and substantiation of employee's expenses are not adequate. Rev. Ruling 60-120, 1960-1 C.B. 83. For instance, the employer may have failed to exercise control over amounts paid out to make sure only ordinary and necessary expenses are incurred. 34 Am. Jur. 2d *supra* at 6934. To the extent that the employer fails to maintain adequate accounting procedures he thereby obligates his employees to separately substantiate their expense account information. Reg. Sec. 1.274-5(e)(5)(iii).

The I.R.S. determined that the defendant's accounting procedure was not adequate which appears reasonable in light of the plaintiff's admission in his deposition that he received per diem payments for days on which he commuted to his work location without staying overnight. However, we cannot accept the plaintiff's contention that the defendant's inadequate accounting constituted a breach of a legal duty to him. The employer's duty to establish and maintain an adequate accounting procedure under the tax regulations is owed to the I.R.S. Although the employee may be spared the inconvenience of making his own accounting to the I.R.S. when the employer's accounting procedures are adequate, we do not agree that a legal duty on the part of the employer to the employee has been created. Also, the regulations are clear that in the event the procedures are deemed inadequate then the employee must separately substantiate his expense account information. At most, the plaintiff and the defendant have similar duties of accounting to the I.R.S. The plaintiff has not established any further duty by the employer to the employee. The fact that the plaintiff was unable to substantiate his expenses because he had destroyed all of his records due to his belief that he would not be called upon to make an accounting was simply due to his own poor business judgment.

Because under the circumstances of this case the plaintiff has not brought forth evidence of the existence of a legal duty by the

Sparks v. Sailors' Snug Harbor

defendant, we hold that no genuine issue of material fact remains for trial. The judgment of the trial court is affirmed.

Affirmed.

Judges HILL and BECTON concur.

LEARY W. SPARKS, EMPLOYEE v. SAILORS' SNUG HARBOR, EMPLOYER, AND
ST. PAUL FIRE & MARINE INSURANCE CO., CARRIER

No. 8310IC1204

(Filed 2 October 1984)

1. Master and Servant § 67.1— permanency of injury—evidence sufficient

The Industrial Commission's finding that an employee suffered loss of or permanent injury to an important part of the body was supported by evidence that plaintiff suffered from discoloration and swelling in his testicles due to probable venous engorgement of the spermatic cord and swelling of veins, and that the only cure was to have the testicle and cord structure removed. G.S. 97-31(24).

2. Master and Servant § 85.2— authority of Deputy Commissioner to submit interrogatories

There was no prejudice when a Deputy Commissioner submitted questions to plaintiff's doctor rather than ordering a deposition because the Deputy Commissioner could have ordered a deposition specifically noting the areas of injury that concerned her, the questions showed no overbearing on the part of the Deputy Commissioner, they could have been asked by the Deputy Commissioner at a hearing, and they were the type of clarifying questions sometimes asked by superior court judges which the Court has often approved. Rule XX of the Industrial Commission.

3. Master and Servant § 93.2— removal from active hearing docket—record not closed

The record did not close when a Deputy Commissioner reset the case for further medical testimony and a different Deputy Commissioner subsequently referred the case back to the first Deputy Commissioner for disposition and removed the case from the active hearing docket.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission filed 21 September 1983. Heard in the Court of Appeals 31 August 1984.

Sparks v. Sailors' Snug Harbor

Ward and Smith, P.A., by William Joseph Austin, Jr., for defendant appellant.

Dunn & Dunn, by Raymond E. Dunn, Jr., for plaintiff appellee.

BECTON, Judge.

I

This Workers' Compensation case was first heard on 28 April 1982, in New Bern, before Lisa Shepard, Deputy Commissioner. Because liability had been stipulated to, and because the employee, Leary Sparks, had already received compensation for temporary total disability, the only disputed issue between the parties was the amount of permanent partial disability, if any, to which the employee might be entitled following a hernia and subsequent surgical procedures.

By order filed 20 May 1982, Deputy Commissioner Shepard found that there was insufficient medical evidence of the loss of or permanent injury to an important internal organ or part of the body and therefore reset the case for the taking of further medical testimony. When the case next came on for hearing before Deputy Commissioner Lawrence B. Shuping, Jr., the employee's attorney did not present further medical evidence, but rather, asked Deputy Commissioner Shuping to take judicial notice of the fact that the testicles and spermatic cord were important internal organs or parts of the body. Deputy Commissioner Shuping did not rule on the judicial notice request. Instead, he referred the case back to Deputy Commissioner Shepard for disposition and removed the case from the active hearing docket.

On 27 October 1982, Deputy Commissioner Shepard entered an Order denying the employee's motion to take judicial notice of the importance of the spermatic cord and testicles and, instead of resetting the matter for the taking of the further medical testimony as set forth in her 20 May 1982 order, submitted three interrogatories to the employee's physician. By the same order, each of the parties was granted the right to request a hearing within ten days after the employee's physician had filed answers to the interrogatories submitted.

Sparks v. Sailors' Snug Harbor

The interrogatories submitted by Deputy Commissioner Shepard, and the answers submitted by the employee's physician, follow:

(1) You have diagnosed the plaintiff's condition as probable venous engorgement of the spermatic cord structures. What is the importance to the body of the spermatic cord structures?

(It supplies blood to the testis and returns blood from same.)

(2) What difficulties, if any, might a patient expect if these structures were removed?

(Most likely would lose the involved testis.)

(3) What problems, if any, would you expect the plaintiff to experience if he does not undergo removal of these structures?

(Continued discomfort.)

On 23 November 1982, Deputy Commissioner Shepard entered an Order awarding the employee \$4,000 as compensation for an injury to an important part of the body. On 17 August 1983, the North Carolina Industrial Commission, by a 2 to 1 vote, affirmed and adopted Deputy Commissioner Shepard's Opinion and Award. The employer and insurance carrier appealed.

II

The defendant-appellants present two arguments on appeal: (1) that the employee failed to show, by sufficient evidence, that he suffered any permanent injury; and (2) that the Deputy Commissioner committed prejudicial and reversible error by submitting interrogatories to Dr. Grice and using the responses to support an award of additional compensation. For the reasons that follow, we reject the defendant-appellants' arguments and affirm the Industrial Commission's decision.

A.

[1] With regard to the permanency of the injury, we have examined each of the Industrial Commission's findings and conclude that they were supported by competent evidence. At the 28 April

Sparks v. Sailors' Snug Harbor

1982 hearing, Dr. Grice had tentatively diagnosed the plaintiff's problem of discoloration and swelling in his testicles as probable venous engorgement of the spermatic cord and swelling of the veins going through his testicles. Significantly, Dr. Grice further testified that "it was my recommendation that the only thing I felt would cure him was to have that testicle and cord structure removed." This testimony supports the finding that the employee suffered the loss of or permanent injury to an important part of the body under N. C. Gen. Stat. § 97-31(24) (1979). And the mere fact that Dr. Grice could not assign a percentage disability rating does not mean that the employee's injuries were not permanent. The answers of Dr. Grice to the specific questions submitted by Deputy Commissioner Shepard, set forth above, confirmed the permanent nature of plaintiff's injuries to an important part of the body.

B.

[2] The defendant-appellants argue, alternatively, that even if the employee proved "permanent injury," "the unauthorized means by which the Deputy Commissioner sought to bolster the employee's incomplete proof" with regard to loss or injury to an important organ or part of the body constituted reversible error. We disagree.

Rule XX A of the Industrial Commission allows a hearing officer to order depositions of medical witnesses "[w]hen additional medical testimony is necessary to the disposition of a case." North Carolina Workers' Compensation Act Annotated at 238 (1980). Our Court has upheld the Commission's power, on its own motion, to order the taking of depositions. *Shore v. Chathan Mfg. Co.*, 54 N.C. App. 678, 284 S.E. 2d 179 (1981), *disc. rev. denied*, 304 N.C. 729, 287 S.E. 2d 902 (1982). And while the Deputy Commissioner may have departed from the expected procedure when she submitted questions to the doctor instead of ordering a deposition, we discern no prejudice since the Deputy Commissioner could have ordered a deposition specifically noting the three areas of inquiry that concerned her. Further, the questions asked were neutral; they showed no overbearing on the part of the Deputy Commissioner; they could have been asked by the Deputy Commissioner at a hearing; and they are the type of clarifying questions sometimes asked by superior court judges which we

Sparks v. Sailors' Snug Harbor

have often approved. More importantly, in *Nash v. Conrad Industries, Inc.*, 62 N.C. App. 612, 303 S.E. 2d 373, *aff'd per curiam*, 309 N.C. 629, 308 S.E. 2d 334 (1983), our Court upheld the submission of questions to an employee's treating physician by the Industrial Commission. In *Nash*, the Commission, after finding an insufficiency of medical evidence, entered an order requiring the treating physician to examine the plaintiff and issue a report containing his findings, and his opinion on (a) whether the plaintiff was able to work, (b) when she was able to return to work, (c) whether she had reached maximum medical improvement, and (d) whether she sustained any permanent partial disability to her back.

[3] In holding that the Deputy Commissioner did not exceed her authority in this matter, we are, of course, rejecting defendant-employer's implicit argument that the record had been closed. We note first that in *Shore*, the Commission itself, as opposed to a Deputy Commissioner, entered an order for the taking of a deposition. Second, Deputy Commissioner Shuping did not close the case, but rather, referred a pending motion back to Deputy Commissioner Shepard for disposition. As a practical matter, the case was removed from the active hearing docket so it would not automatically be reset on the next New Bern Industrial Commission's calendar.

III

Based on the foregoing, this case is

Affirmed.

Judges HILL and BRASWELL concur.

Town of Kenansville v. Summerlin

TOWN OF KENANSVILLE v. RONALD C. SUMMERLIN

No. 834DC1023

(Filed 2 October 1984)

1. Municipal Corporations § 30.5— zoning ordinance—failure of city to follow procedures—landowner not entitled to permit

The fact that plaintiff did not follow the procedures established in its zoning ordinances in handling defendant's case did not *ipso facto* invalidate plaintiff's legislative determination as to proper density and entitle defendant to a permit for the construction of a second building on his property.

2. Municipal Corporations § 30.15— zoning ordinance—no discriminatory application

There was no merit to defendant's contention that other landowners had two non-accessory buildings on their lots and that accordingly plaintiff was practicing unfair discrimination by denying him a building permit for a second building on his lot, since defendant's offer of proof showed basically that various accessory buildings existed or were built on other property, but in only one case was a second building constructed on a single lot after enactment of the ordinance, and defendant failed to show that no variance had issued.

3. Administrative Law § 2— zoning—variance—failure to exhaust administrative remedies

Defendant's eligibility for a zoning variance was not before the court on appeal where defendant had failed to exhaust his administrative remedies.

4. Jury § 1— issue of law—no right to jury trial

Where the only issue properly before the court was an issue of law as to whether defendant was in violation of plaintiff's zoning ordinance, defendant was not entitled to a jury trial.

APPEAL by defendant from *Martin, James N., Judge*. Judgment entered 15 June 1983 in Superior Court, DUPLIN County. Heard in the Court of Appeals 7 June 1984.

Bruce H. Robinson, Jr., for defendant appellant.

William E. Craft, for plaintiff appellee.

JOHNSON, Judge.

Defendant attempted to build a second structure on his property within the zoning jurisdiction of the Town of Kenansville (hereinafter "the Town"); the Town's zoning ordinance restricts development on each lot to one building plus customary accessory

Town of Kenansville v. Summerlin

buildings. The Town's zoning inspector accordingly denied defendant a building permit; he presented his case to the Town Board, which passed a resolution asking defendant to stop construction until he could obtain a permit, but threatened legal action if he continued to build. Defendant continued construction, and the Town obtained a restraining order. The Town then sought, and obtained, an order finding defendant in contempt of court. Defendant filed an answer claiming that the permit was wrongfully denied, and asking for a writ of mandamus. Following a hearing, the court found defendant in violation of the Town's zoning ordinances for building without a permit, and ordered him to comply. From this order defendant appeals.

I

[1] Each side argues that the other has not followed proper procedure: defendant claims that the Town did not follow its own procedures, denying him due process; the Town argues that defendant did not properly file an appeal from the initial decision to deny the permit. The proceedings below, unsurprisingly, reflect the informal conduct of business characteristic of the small towns of this State.

The Town does possess substantial authority to establish zoning procedures and to provide for the resolution of zoning disputes. G.S. 160A-381 (grant of power); G.S. 160A-384 (general zoning procedure); G.S. 160A-388 (board of adjustment). Having exercised this authority by enacting a zoning ordinance, the Town must follow the procedures it has set therein. *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974). If such procedures are inconvenient, the Town should change them, not ignore them. In particular, the Town has failed to follow the ordinance's mandates to appoint a board of adjustment or to file the decision of the Town Board (apparently acting as the board of adjustment). Under the circumstances, it would be inequitable to dismiss this appeal, as the Town urges, because defendant failed to file a written notice of appeal to a non-existent board of adjustment.

II

On the other hand, defendant has not advanced any evidence to support his contention that he is therefore entitled to a

Town of Kenansville v. Summerlin

building permit. The uncontradicted evidence for the Town showed that defendant attempted to erect a second non-accessory structure on the same lot, in defiance of the terms of the ordinance. Defendant does not argue before this Court that the ordinance is impermissibly vague, nor does our reading of it appear to justify such a conclusion. See *Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E. 2d 352 (1971) (general test). Defendant offers no evidence showing that he was misled in any way by the ordinance. *Id.* The fact that the Town failed to follow its ordained procedures for handling defendant's case does not *ipso facto* invalidate the Town's legislative determination as to proper density and entitle defendant to a permit. See *Craver v. Board of Adjustment*, 267 N.C. 40, 147 S.E. 2d 599 (1966) (procedural infirmity not automatically prejudicial).

III

[2] Defendant's evidence, rather than tending to show entitlement to a permit, tended instead to show that other landowners in the Town had two non-accessory buildings on their lots and that accordingly the Town was practicing unfair discrimination by denying him a building permit. Defendant's offer of proof showed basically that various accessory buildings existed or were built on other property. In only one case was a second building, which may or may not have been an accessory building, constructed on a single lot after enactment of the ordinance, and in that case defendant failed to show that no variance had been issued. No pattern of administrative discrimination sufficient to overcome the presumption of good faith appears. See *Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E. 2d 382 (1974) (burden on complainant to overcome presumption). On this record, defendant is not entitled to a permit.

IV

[3] The record reflects that defendant has insisted throughout on his *present* entitlement to a permit. Assuming, *arguendo*, that this appeal indicates an intent to seek a variance, we conclude that defendant has failed to exhaust his administrative remedies. He has never applied for a variance, and nothing in the record suggests that his appearance before the Town Board should be so construed. It is well established that when the legislature has created an effective administrative remedy, it is exclusive and the

Town of Kenansville v. Summerlin

matter does not become ripe for review until the statutory remedy has been exhausted. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). The present case illustrates the soundness of this rule, as the record contains little if any concrete evidence suggesting that a variance should or should not be granted. The record reflects that the Town remains willing to grant the permit if defendant will only make proper application; accordingly, we decline to hold that exhaustion of administrative remedies would be a "patently useless step" and thus unnecessary. See *Town of Hillsborough v. Smith*, 4 N.C. App. 316, 167 S.E. 2d 51, reversed on other grounds, 276 N.C. 48, 170 S.E. 2d 904 (1969). Defendant's eligibility *vel non* for a variance is accordingly not before us.

V

[4] Defendant assigns error to the court's refusal to grant him a jury trial. The only issue properly before the court was an issue of law: Was defendant in violation of the Town zoning ordinance? The facts relevant to this question were not disputed; the only questions before the court were questions of law. No error occurred. *Glover v. Spinks*, 12 N.C. App. 380, 183 S.E. 2d 262 (1971).

VI

The right to virtually unrestricted use of one's land enjoyed by our forebears no longer exists. To own real property in this day, particularly within the limits of a city or town, is necessarily to accept the likelihood of some legal restrictions, as our courts have long recognized. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Here, defendant has doggedly insisted on his right to build, and continued to build, in the face of court order and despite adequate, if untested, administrative remedy. He has never applied for a variance or reapplied for a permit. The court ruled correctly on the narrow question before it; the other questions brought forward are not presently reviewable. The judgment is therefore

Affirmed.

Judges WEBB and PHILLIPS concur.

Tri City Building Components v. Plyler Construction

TRI CITY BUILDING COMPONENTS, INC. v. PLYLER CONSTRUCTION COMPANY, INC.

No. 8321SC1191

(Filed 2 October 1984)

1. Sales § 22.1— defective roof trusses—sufficiency of the evidence

In an action in which defendant had denied liability for the purchase of roof trusses and counterclaimed for damages from the collapse of the trusses on the ground that the trusses were defective, summary judgment on the counterclaim was erroneous where there was evidence that substandard lumber in a truss had caused the collapse.

2. Rules of Civil Procedure § 56.1— summary judgment—ten days' notice of hearing—required

A motion for summary judgment should not have been heard without the ten days' notice required by Rule 56(c), even though the case had been calendared for trial on the date the motion was heard, but was taken off the calendar before that date, and even though the parties were present to argue a motion for a change of venue.

APPEAL by defendant from *Albright, Judge*. Order entered 17 June 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 30 August 1984.

Plaintiff sold defendant construction company some roof trusses, which were needed in extending the roof of a building it was enlarging. When nearly all the trusses, which were 68 feet long and made of wood, had been installed into newly constructed cement block walls, but before any of the metal roofing was placed on the trusses, the entire roof structure collapsed, damaging the trusses, the building walls, and certain of defendant's equipment. Defendant refused to pay for the trusses and plaintiff sued for the agreed price of \$5,416.78. In the answer defendant admitted the purchase but denied liability on the grounds that the trusses were defective, and counterclaimed for the damage allegedly sustained as a consequence thereof.

The case was calendared for trial for the 13 June 1983 term of Forsyth County Superior Court, but was taken off the calendar before then because of an illness in the family of one of defendant's witnesses. Defendant's motion for a change of venue to Buncombe County where it is located was added to that calendar, however. On Tuesday, 7 June 1983, plaintiff moved for summary

Tri City Building Components v. Plyler Construction

judgment on both its claim and defendant's counterclaim and mailed a copy to defense counsel in Asheville, but no notice of hearing was attached. When defendant's motion for a venue change came on for hearing on 13 June 1983, the trial judge also heard plaintiff's motion for summary judgment, though defendant objected thereto. The court's position was that plaintiff's failure to give the ten days' notice that Rule 56(c) of the N.C. Rules of Civil Procedure requires for summary judgment motions would not prejudice defendant, since the case had been calendared for trial and defendant was required to be ready therefor. After considering the court file and plaintiff's brief, an order was entered in plaintiff's favor on its claim for \$5,416.78, but plaintiff's motion for summary judgment on defendant's counterclaim was denied.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by W. Thompson Comerford, Jr., Leon E. Porter, Jr., and Jane C. Jackson, and Horton, Hendrick & Kummer, by Hamilton C. Horton, Jr., and Edward V. Zotian, for plaintiff appellee.

Gray, Kimel & Connolly, by Joseph A. Connolly, for defendant appellant.

PHILLIPS, Judge.

The order of summary judgment was erroneously entered for two reasons. It is therefore vacated and the case is remanded to the Superior Court for trial.

[1] One reason the summary judgment was erroneous is that an issue of fact as to whether plaintiff's trusses were defective—the dominant issue upon which defendant's affirmative defense and counterclaim both rest—was raised by the evidence that was before the court. Plaintiff took the deposition of Robert H. Plyler, who had helped operate the defendant construction company for five years and was there when the trusses fell. He testified that: The collapse started with one truss breaking in two, and when that truss fell it pulled the other trusses, the bracing and the walls down with it; he examined that truss, as well as the other trusses, and found that it had broken cleanly across a knot pattern, whereas the other trusses sustained splintering, shearing and other damage when they fell to the paved floor or on each other. When asked by plaintiff's counsel "What caused that truss to break?" the witness responded, in substance, substandard, too

Tri City Building Components v. Plyler Construction

weak lumber which contained knots that lumber of that grade was not supposed to have. On several other occasions during the deposition the witness testified that the trusses were made of substandard lumber and that substandard lumber caused the failure. This evidence raised an issue for the jury and the court's holding to the contrary was error. That the witness also testified that other things could have caused or contributed to the collapse of the trusses—such as damage done to some of the trusses in transit and improperly arranged concrete block walls that the trusses were affixed to—is beside the point for the purposes of this appeal. On a motion for summary judgment judges do not resolve inconsistencies and conflicts in evidence, nor do they assess the credibility or weight of the evidence; they only determine whether the evidence, under any view taken of it, raises a material issue of fact. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

[2] The court's other error was in hearing the motion when the ten days' notice required by Rule 56(c) had not been given and defendant had had no fair opportunity to prepare for the hearing. The court's finding that defendant was not prejudiced since the case had been calendared for trial is supported neither by the record nor the common experience of the profession. Being prepared to call witnesses and to try a case that has been calendared for a month is not the same thing as being prepared to oppose a summary judgment motion that has not been calendared at all. *Zimmerman's Department Store, Inc. v. Shipper's Freight Lines, Inc.*, 67 N.C. App. 556, 313 S.E. 2d 252 (1984). Defense counsel's only reason for going to Winston-Salem from Asheville that day, so far as the record reveals, was to argue his change of venue motion; he had no reason to suppose that the motion for summary judgment would be heard and was not prepared for such a hearing. Defendant had no brief on the issue to hand up to the court—and could not have been expected to have one under the circumstances—but plaintiff did submit a brief, which the court considered. As was indicated in *Ketner v. Rouzer*, 11 N.C. App. 483, 182 S.E. 2d 21 (1971) and *Zimmerman's Department Store, Inc. v. Shipper's Freight Lines, Inc.*, *supra*, with adequate time to prepare for the summary judgment hearing, the issues can often be made clearer and the court's task easier. The defendant either by affidavit or brief might have been able to point more directly

Hardy v. Floyd

to the crucial evidence that was available on the issue, if it had had an opportunity to do so, and that the court might have profited by such aid, is self-evident. Except for such analysis of the available evidence as may have been made in plaintiff's brief, which is not in the record, the record indicates that the court arrived at its decision from examining the considerable papers in the court file, whereas such decisions are usually made after comparing the analyses, references, and summaries of the opposing lawyers. This may account for the court ruling that the evidence failed to raise a material issue of fact on defendant's affirmative defense, but did raise such an issue on defendant's counterclaim, when both the defense and the counterclaim rest on the contention that the trusses were defective. In any event, dismissing a party's claim or defense by summary judgment is too grave a step to be taken on short notice; unless, of course, the right to notice that those opposing summary judgment have under Rule 56(c) is waived. *Raintree Corporation v. Rowe*, 38 N.C. App. 664, 248 S.E. 2d 904 (1978). But being in court to present another motion and objecting to the hearing being held is no waiver.

Vacated and remanded.

Judge WEBB concurs.

Judge JOHNSON concurs in result.

ROYCE HARDY AND MICHAEL ABU v. J. E. FLOYD

No. 8316SC1229

(Filed 2 October 1984)

Appeal and Error § 14— notice of appeal 12 days after order entered—timeliness

Where defendant's Rule 59(e) motion to alter and amend orders of the trial court was denied on 23 June 1983, defendant's notice of appeal given on 5 July 1983 was timely where the tenth day after entry of the order appealed from was a Sunday, and the next day, 4 July 1983, was a legal holiday.

APPEAL by defendant from *Britt, Judge*. Orders entered 23 June and 15 July 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 20 September 1984.

Hardy v. Floyd

In this civil action plaintiffs seek dissolution of a partnership, appointment of a temporary and permanent receiver for partnership property, and an accounting by defendant of partnership assets and liabilities. By orders entered on 17 May and 20 May, 1983, Judge Herring made permanent the prior appointment of a temporary receiver pending outcome of the litigation and approved assignment of a lease of premises previously utilized by the partnership business. On 1 June 1983 the defendant served a motion pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 59(e), North Carolina Rules of Civil Procedure, to alter and amend the orders dated 17 and 20 May, 1983. On 23 June 1983, after making detailed findings and conclusions, Judge Britt entered an order denying defendant's Rule 59 motion. On 5 July 1983 the defendant filed in the office of the Clerk of Superior Court a written notice of appeal "from the Order of the Honorable Samuel E. Britt dated June 23, 1983, denying Defendant's motion to vacate the orders of the Honorable D. B. Herring, Jr., dated May 17 and May 20, 1983." On 15 July 1983, Judge Britt, *ex mero motu*, entered an order dismissing defendant's appeal, declaring that "[a]t no time within the time allowed by law has the defendant given notice of appeal. . . ." Defendant then gave notice of appeal from the order dated 15 July 1983.

Musselwhite, Musselwhite & McIntyre, by Fred L. Musselwhite, for plaintiffs, appellees.

Horton and Michaels, by John A. Michaels, for defendant, appellant.

HEDRICK, Judge.

Defendant assigns error to the order dated 15 July 1983 dismissing his appeal from the order denying his Rule 59 motion. Rule 3, North Carolina Rules of Appellate Procedure, and N.C. Gen. Stat. Sec. 1-279 provide that notice of appeal in a civil action must be given within ten days of the date of entry of the order appealed from. The order appealed from in this case was entered on 23 June 1983. Notice of appeal was given on 5 July 1983. In calculating whether notice of appeal is timely given, the tenth day is not considered if it is a Saturday, Sunday, or legal holiday. Rule 27, North Carolina Rules of Appellate Procedure. In such case, the ten-day period runs at the end of the next day that is not a

Hardy v. Floyd

Saturday, Sunday, or legal holiday. *Id.* In the present case, the tenth day fell on Sunday, 3 July 1983. The next day, 4 July 1983, was a legal holiday. Thus, the notice of appeal filed on 5 July 1983 was timely. Therefore, the order dismissing defendant's appeal from the order denying his Rule 59 motion is erroneous, and we will consider defendant's appeal from that order.

Defendant's Assignments of Error Nos. 11-20 and the exceptions on which they are based relate to the order dated 23 June 1983 denying defendant's Rule 59 motion. A motion made pursuant to Rule 59 must, under the provisions of that Rule, be served no later than ten days after entry of the judgment. In the instant case the record discloses that defendant's Rule 59 motion was served on 1 June 1983, more than ten days after entry of the orders he sought to have altered and amended. Nevertheless, Judge Britt ruled on the motion and defendant appealed therefrom. Thus we will consider, in the exercise of our discretion, the merits of Assignments of Error Nos. 11-20, only to say that a motion made pursuant to Rule 59(e) is addressed to the sound legal discretion of the trial judge and his ruling thereon will not be disturbed absent a showing of abuse of that discretion. *Hamlin v. Austin*, 49 N.C. App. 196, 270 S.E. 2d 558 (1980). Defendant has not argued that Judge Britt abused his discretion, nor does the record disclose any such abuse.

Defendant's Assignments of Error Nos. 1-10 and the exceptions on which they are based relate to the orders entered by Judge Richardson on 28 April 1983 and Judge Herring on 17 and 20 May 1983. This appeal, however, was taken from the order dated 23 June denying defendant's Rule 59(e) motion and the order dated 15 July dismissing that appeal. Defendant has not appealed from the orders of Judges Richardson and Herring. Thus we have no jurisdiction to consider these assignments of error. Rule 3, North Carolina Rules of Appellate Procedure; N.C. Gen. Stat. Sec. 1-279. Even if defendant had given notice of appeal from Judge Herring's orders dated 17 and 20 May 1983 on 5 July 1983, such notice would not have been proper, since service of the Rule 59 motion was not timely so as to toll the running of the time within which notice of appeal must be given. *Id.*

The result is: the order dated 23 June 1983 denying defendant's Rule 59(e) motion is affirmed; that portion of the appeal pur-

State v. Hicks

porting to challenge the orders entered on 28 April and 17 and 20 May 1983 is dismissed.

Affirmed in part and dismissed in part.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DANNY RAY HICKS

No. 8327SC1290

(Filed 2 October 1984)

1. Arson § 2— sufficiency of indictment

There was circumstantial evidence sufficient for the court to charge the jury that the defendant could be found guilty if he either "set fire or caused the burning" or "set fire to his dwelling or caused to be burned, his dwelling," where defendant had approached an acquaintance about burning his house and where defendant was within one and one-quarter miles of his residence at the time of the fire. Defendant's claim of prejudicial ambiguities in the indictment and jury charge is without merit. G.S. 14-65.

2. Arson § 4.1— motion to dismiss—circumstantial evidence sufficient

When the evidence is considered in the light most favorable to the State, and when defendant failed to offer any evidence tending to explain his attempted solicitation of another to burn his house or his absence from the place where he was staying at the time the fire started, there was sufficient evidence of defendant burning or procuring another to burn his dwelling in violation of G.S. 14-65 to submit the charge to the jury.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 8 August 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 18 September 1984.

Defendant was convicted of fraudulently setting fire to a dwelling house in violation of G.S. 14-65 and given a prison sentence. He appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Harris, Bumgardner and Carpenter, by Don H. Bumgardner, for defendant appellant.

State v. Hicks

HILL, Judge.

Defendant first assigns as error the trial court's denial of his motion to compel the prosecution to elect what theory of criminal activity defendant engaged in to commit the crime. G.S. 14-65 sets forth alternative theories in proving guilt: (1) proof that the defendant did the burning or (2) proof that the defendant procured another to do the burning. Defendant contends that the denial of his motion to compel an election placed him at a disadvantage in knowing what specific evidence he must offer in his defense. For the reasons which follow, we find no error in this assignment.

[1] The evidence, essentially circumstantial, was such that the jury could find defendant guilty under the indictment which alleged that defendant "cause[d] to be burned" his dwelling and under G.S. 14-65. The evidence in such cases seldom establishes guilt directly; rather, the criminal agency of defendant is often proved by circumstantial evidence. In the present case, there was evidence pointing toward procuring the burning by another. An acquaintance testified that the defendant asked him if he would be interested in burning his house for \$2,500.00. In fact, the defendant approached this acquaintance several times about burning his house. This occurred about a week before the fire. However, the acquaintance denied any interest in burning defendant's house, and at the time of the fire the defendant was within one and one-quarter miles of his residence. Defendant failed to explain to the satisfaction of the jury the conversation with the acquaintance and his absence from home at the time of the fire. This circumstantial evidence is sufficient for the court to charge the jury that the defendant could be found guilty if he either "set fire or caused the burning" or "set fire to his dwelling or caused to be burned, his dwelling," and defendant's claim of prejudicial ambiguities in the indictment and jury charge is without merit.

[2] Defendant next assigns as error the trial court's denial of his motion to dismiss at the close of all the evidence. Defendant contends that the evidence was insufficient to allow its submission to the jury, asserting that the evidence falls short of what was required in *State v. Tew*, 62 N.C. App. 190, 302 S.E. 2d 633, *disc. rev. denied*, 309 N.C. 464, 307 S.E. 2d 370 (1983). The present case is distinguishable from *Tew* in that the State had failed to place

State v. Hicks

the defendant at or near the scene of the crime at a time when the fire could have been set. Here, the defendant was within one and one-quarter miles from the scene at a time before the fire was detected—during which time he could easily have reached the scene.

Likewise, defendant's reliance on the cases of *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971), and *State v. Needham*, 235 N.C. 555, 71 S.E. 2d 29 (1952), is misplaced. The ruling in each of those cases was founded on the fact that the State's circumstantial evidence was insufficient because in each case the defendant had offered evidence tending to show that the circumstances were consistent with his version of the incident. That is, the defendant was able to explain the circumstances in a way that was logical and consistent with his innocence. In the present case, defendant failed to offer any evidence tending to explain his attempted solicitation of another to burn his house, or his absence from the place where he was staying at the time the fire started in any way that pointed towards his innocence.

In determining whether the evidence is sufficient to carry a case to the jury, the general rule is that if there is any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury. *State v. King*, 264 N.C. 578, 142 S.E. 2d 130 (1965). In the present case, when the evidence is considered in the light most favorable to the State as it should be on a motion to dismiss, *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979), it appears there was sufficient evidence of defendant burning or procuring another to burn his dwelling in violation of G.S. 14-65 to submit the charge to the jury.

We have examined defendant's remaining assignments of error and find no merit in them. Defendant received a fair trial free of prejudicial error.

No error.

Judges ARNOLD and WELLS concur.

Forbes Homes, Inc. v. Trimpi

FORBES HOMES, INC., A NORTH CAROLINA CORPORATION v. JOHN G. TRIMPI AND
TRIMPI, THOMPSON AND NASH

No. 831DC1083

(Filed 2 October 1984)

**Contracts § 25.1— agent's agreement to make payments for third party—failure to
pay—dismissal of action improper**

The trial court erred in dismissing plaintiff's action pursuant to G.S. 1A-1, Rule 12(b)(6) where plaintiff alleged facts which, if offered in evidence, would allow a jury to find that defendant attorneys promised plaintiff that, if plaintiff would make certain payments for a third party, defendants would retain from the proceeds of a claim they were handling for the third party funds with which they would reimburse plaintiff; plaintiff accepted this offer by making the payments; defendants refused to reimburse plaintiff from the proceeds of the settlement for the third party; and if a jury should find these facts, the defendant would be liable to the plaintiff for breach of contract.

Judge JOHNSON dissenting.

APPEAL by plaintiff from *Beaman, Judge*. Judgment entered 3 August 1983 in District Court, PASQUOTANK County. Heard in the Court of Appeals 21 August 1984.

The plaintiff appeals from a judgment dismissing its action. The plaintiff alleged that the defendant John G. Trimpi promised the plaintiff that if the plaintiff would make certain payments on behalf of Milford Simpson that Mr. Trimpi would reimburse the plaintiff from proceeds of a personal injury claim Mr. Trimpi was handling for Mr. Simpson. The plaintiff incorporated as part of its complaint a letter from Mr. Trimpi which said in part:

"Subject to Mr. Simpson's approval, which I feel certain he will give, this firm will make restitution to you out of the net proceeds from any settlement or court recovery we make with regard to Mr. Simpson's personal injury claim arising out of an accident occurring on March 17, 1979. If you do not hear from us within ten days from receipt of this letter, you may assume that Mr. Simpson has given us the authority to make such payment to you."

The plaintiff alleged further that it was not notified that Mr. Simpson had not given the defendant authority to pay the plaintiff from the proceeds of the personal injury claim and acting on the representations of the defendant it had made the payments

Forbes Homes, Inc. v. Trimpi

totalling \$4,192.92 on Mr. Simpson's account. The plaintiff alleged on information and belief that the personal injury claim had been settled and the defendant John Trimpi had refused to make payment as he had promised to do.

The Court granted the defendants' motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) and the plaintiff appealed.

Frank B. Aycock, Jr., for plaintiff appellant.

Trimpi, Thompson and Nash by Thomas P. Nash, IV, for defendants appellees.

WEBB, Judge.

We reverse the judgment of the District Court. The plaintiff has alleged facts which if offered in evidence would allow a jury to find the defendants promised the plaintiff that if the plaintiff would make certain payments for a third party, the defendants would retain from the proceeds of a claim they were handling for the third party funds with which they would reimburse the plaintiff. The plaintiff accepted this offer by making the payments and the defendants have refused to reimburse the plaintiff from the proceeds of the settlement for the third party. If a jury should find these facts, the defendant would be liable to the plaintiff for breach of contract.

The defendants, relying on *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976), argue that Mr. Trimpi was the agent of Mr. Simpson and that an agent acting within the scope of his authority is not liable for a contract made for his principal. We do not disagree with this statement of the law. If, as in this case, however, the agent agrees with the promisee that he will be bound by the contract he is so bound and is liable for the contract's breach.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge JOHNSON dissents.

Harris v. Walden

Judge JOHNSON dissenting.

I respectfully dissent from the majority opinion. I believe that under the holding of *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976), the plaintiff's cause of action lies against the principal, Mr. Simpson, and not the agent, Mr. Trimpi. When a contract is made with a known agent, acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone. *See also, Jenkins v. City of Henderson*, 214 N.C. 244, 247, 199 S.E. 37, 39 (1938). The letter from Mr. Trimpi to the plaintiff discloses that Mr. Trimpi was acting as an agent for his principal, Mr. Simpson, seeking to use the principal's funds to fulfill the obligations of the contract.

EDNA B. HARRIS v. WILLIAM S. WALDEN AND WIFE, MARY SUE WALDEN

No. 8325SC1213

(Filed 2 October 1984)

Quieting Title § 2.2— showing of marketable title—adverse possession not shown

In an action to quiet title the trial court erred in denying plaintiff's motion for partial summary judgment and in finding sufficient evidence of adverse possession under seven years color of title to divest plaintiff of any title to the lands involved where plaintiff's evidence, which included (1) an affidavit of a land surveyor establishing plaintiff's record ownership and containing a metes and bounds description of the property and (2) a showing of an unbroken chain of title to the property in dispute back to 1925, established a marketable title as provided in G.S. 47B-2(a), and plaintiff thereby presented prima facie evidence that she owned the property described in her record chain of title; moreover, defendants' answer which raised the affirmative defense of adverse possession under color of title was not verified, and defendants failed to support their contentions of adverse possession by the factual showing required under G.S. 1A-1, Rule 56.

APPEAL by plaintiff from *Grist, Judge*, on denial of her motion for partial summary judgment and from judgment entered by *Saunders, Judge*. Judgment entered 9 May 1983 in Superior Court, BURKE County. Heard in the Court of Appeals 31 August 1984.

In her original action plaintiff sought to quiet title to a portion of her property on which existed a lappage in a deed under

Harris v. Walden

which defendants claimed title, and to recover damages sustained by plaintiff arising out of the cutting of timber by the defendants. The defendants filed an unverified answer denying plaintiff's title together with a defense and counterclaim alleging title acquired by adverse possession. On her motion for summary judgment on the issue of ownership, plaintiff offered into evidence her pleadings, copies of deeds in her chain of title attached thereto as exhibits, the affidavit of Milton U. Viggers, a land surveyor, and the depositions of another land surveyor, Ronnie Childres, and the defendant, William S. Walden.

In their answer to plaintiff's motion for summary judgment, defendants offered their unverified answer and the depositions of record. Judge Grist entered judgment denying plaintiff's motion for partial summary judgment, and the case proceeded to trial. The trial judge, sitting as a jury, found sufficient evidence of adverse possession under seven years color of title to divest plaintiff of any title to the lands involved and entered judgment for defendants. Plaintiff appeals.

Simpson, Aycock, Beyer and Simpson, P.A., by Samuel E. Aycock and Michael Doran, for plaintiff appellant.

McMurray and McMurray, by Martha McMurray and John H. McMurray, for defendant appellees.

HILL, Judge.

The question presented by this appeal is whether the evidence offered by plaintiff was sufficient to make out a prima facie case entitling her to summary judgment. Upon motion a summary judgment should be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). The burden is upon the movant to establish the absence of any issue of fact, and once satisfied, the opposing party must come forward with facts, rather than mere allegations, which negate the moving party's case. *Hotel Corp. v. Taylor and Fletcher v. Foremans, Inc.*, 301 N.C. 200, 271 S.E. 2d 54 (1980); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). "If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S.

Harris v. Walden

1A-1, Rule 56(e); *Kidd v. Early*, 289 N.C. 343, 365, 222 S.E. 2d 392, 407 (1976).

Applying these principles to the facts of this case, we hold that plaintiff was entitled to judgment as a matter of law on the issue of ownership of the disputed land. Plaintiff's forecast of the evidence includes (1) an affidavit of a land surveyor establishing plaintiff's record ownership and containing a metes and bounds description of the property, and (2) the tracing of an unbroken chain of title to the property in dispute back to 1925, a period in excess of 30 years. Therefore, plaintiff established a marketable title as provided in G.S. 47B-2(a). In so doing plaintiff presented prima facie evidence that she owns the property described in her record chain of title, G.S. 47B-2(d), and, nothing else appearing, established her right to judgment in her favor. *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889); *Allen v. Morgan*, 48 N.C. App. 706, 269 S.E. 2d 753 (1980).

Although defendants raise the affirmative defense of adverse possession under color of title in their answer to plaintiff's complaint, this answer is not verified. Defendants came forward with no evidence or rebuttal to plaintiff's motion for summary judgment in which plaintiff established a prima facie case of superior title. Defendants fail to support their contentions of adverse possession by the factual showing required to oppose plaintiff's affidavit under Rule 56. Moreover, plaintiff's evidence is not inherently incredible, self-contradictory, nor susceptible to conflicting inferences. See *Stanley v. Walker*, 55 N.C. App. 377, 285 S.E. 2d 297 (1982). Accordingly, under the law of summary judgment it was incumbent on the trial judge to grant partial summary judgment on the ownership of the land in dispute in plaintiff's favor. Plaintiff had tendered a forecast of uncontradicted evidence of ownership of the tract of land in controversy.

The decision of the trial judge is reversed and the case is remanded to the superior court of Burke County for entry of partial summary judgment as set out herein, and for trial on the issue of damages for timber cut within the area in controversy.

Reversed and remanded.

Judges BECTON and BRASWELL concur.

State v. Hobson

STATE OF NORTH CAROLINA v. RALPH MAJOR HOBSON

No. 8423SC42

(Filed 2 October 1984)

Criminal Law § 124; Bastards § 8— sufficiency of verdict—must allude to warrant or establish specific elements

Where defendant was charged with *willful* refusal to support and maintain *his* illegitimate child, a verdict of "guilty of non-support of illegitimate child" was improper because it did not allude generally to the warrant or use specific language sufficient to show a conviction of the offense charged. The preferred practice in cases charging a violation of G.S. 49-2 calls for submission of *written* issues to the jury.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 24 August 1983 in Superior Court, YADKIN County. Heard in the Court of Appeals 24 September 1984.

Defendant was charged with the willful refusal to support and maintain his illegitimate child under G.S. 49-2. The jury returned a verdict of "[g]uilty of non-support of illegitimate child." Defendant was given a six-month sentence to be suspended on the condition that he pay \$45 per week in support. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Lemuel W. Hinton, for the State.

William M. Allen, Jr., for defendant appellant.

VAUGHN, Chief Judge.

We hold that the verdict returned by the jury was improper and must be set aside.

Defendant was charged and tried under G.S. 49-2, which makes it a misdemeanor offense for "[a]ny parent [to] willfully [neglect] or . . . [refuse] to support and maintain his or her illegitimate child. . . ." For defendant to be found guilty of this criminal offense, two essential elements must be established: First, that the defendant is a parent of the illegitimate child in question; and second, that the defendant has *willfully* neglected or refused to support such child. *State v. Coffey*, 3 N.C. App. 133, 164 S.E. 2d 39 (1968). The begetting of an illegitimate child is not in itself a crime, *State v. Tyson*, 208 N.C. 231, 180 S.E. 85 (1935),

State v. Hobson

and neither is the willful refusal to support the child of another. A jury verdict must unambiguously state that the defendant has been found guilty of a crime. It has therefore been held that a general verdict of "[g]uilty" or "[g]uilty as charged" is sufficient when a defendant is properly charged under G.S. 49-2. *State v. Ellison*, 230 N.C. 59, 60, 52 S.E. 2d 9, 10 (1949). However, "when the jury undertakes to spell out its verdict without specific reference to the charge, . . . it is essential that the spelling be correct." *State v. Lassiter*, 208 N.C. 251, 252, 179 S.E. 891, 891 (1935). A finding of "[g]uilty of willful non-support of illegitimate child" is insufficient to sustain a verdict because it "does not fix the paternity of the child." *Ellison*, 230 N.C. at 60, 52 S.E. 2d at 10; see also *State v. Williams*, 22 N.C. App. 502, 206 S.E. 2d 783 (1974). Similarly defective is a verdict of "[g]uilty of failure to support and maintain his bastard child" because it omits the element of willfulness. *State v. Allen*, 224 N.C. 530, 531, 31 S.E. 2d 530, 530 (1944).

In the present case, a warrant of arrest properly charged defendant with the willful failure to support his illegitimate child. However, the jury did not return a verdict of "guilty" or "guilty as charged" or "guilty of *willful* non-support of *his* illegitimate child," but returned a verdict of "[g]uilty of non-support of illegitimate child." This verdict neither alludes generally to the warrant nor uses specific language sufficient to show a conviction of the offense charged. It is in fact completely consistent with defendant's contention that he is not the father of the child. See, e.g., *Lassiter*, *supra*. By itself the verdict is senseless and unresponsive to the warrant and should not have been accepted by the trial court. The judgment of the court is therefore not supported by the verdict as rendered by the jury.

Although a general verdict of "guilty" or "guilty as charged" may be proper, it is not required. *State v. Ellis*, 262 N.C. 446, 137 S.E. 2d 840 (1964). Indeed, we must strongly reemphasize that the preferred practice in cases charging a violation of G.S. 49-2 calls for the submission of *written* issues to the jury. *State v. McKee*, 269 N.C. 280, 152 S.E. 2d 204 (1967); *State v. Lynch*, 11 N.C. App. 432, 181 S.E. 2d 186 (1971). As the present case illustrates, "the submission of issues in prosecutions under G.S. 49-2 is, as a practical matter, almost a necessity." *Ellis*, 262 N.C. at 451, 137 S.E. 2d at 845. A jury's verdict based on such issues should include an

Davis v. Mobilift Equipment Co.

individual determination of four issues. First, is defendant a parent of the illegitimate child in question? Second, did defendant receive notice and demand for support? Third, did defendant willfully neglect or refuse to provide adequate support for the child? Lastly, if the answers to the preceding are yes, is defendant *guilty* of willful neglect or refusal to maintain and provide adequate support for his illegitimate child? Such a verdict of the jury is in the nature of a special verdict and, when attempted, must reveal that all issues of ultimate material fact have been resolved against defendant. *See generally, Ellis, supra.*

We have carefully reviewed all additional assignments of error and find them to be without merit.

Judgment vacated. Remanded for a new trial.

Judges WHICHARD and JOHNSON concur.

EDWARD J. DAVIS AND WIFE, BOBBIE S. DAVIS v. MOBILIFT EQUIPMENT COMPANY, INC., WHITE FARM EQUIPMENT COMPANY, AND MINNEAPOLIS-MOLINE MANAGEMENT ASSOCIATED, INC.

No. 8316SC1042

(Filed 2 October 1984)

Limitation of Actions § 4.2— product liability—statute of repose

Plaintiff's claim was not cognizable where he brought his action more than six years after defendant's sale of a lift truck to plaintiff's employer, because G.S. 1-50(6) is a statute of repose, which "constitutes a substantive definition of, rather than procedural limitation on, rights." Commencement of suit within the allotted time is a "condition to the legal cognizability of [the] claim." G.S. 1-50(5).

APPEAL by plaintiffs from *Britt, Samuel E., Judge*. Order entered 21 June 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 17 September 1984.

Hedrick, Eatman, Gardner, Feerick, and Kincheloe, by Richard T. Feerick and John F. Morris, for plaintiff appellants.

McLean, Stacy, Henry & McLean, P.A., by William S. McLean, for defendant appellee Mobilift Equipment Company, Inc.

Davis v. Mobilift Equipment Co.

WHICHARD, Judge.

Defendant Mobilift Equipment Company, Inc. (Mobilift) sold an industrial lift truck to plaintiff-husband's employer on 17 August 1973. While plaintiff-husband was operating the truck on 16 June 1980, a box fell from it, struck him, and caused permanent disabling injuries. Plaintiffs commenced this action on 2 July 1981 seeking damages for plaintiff-husband's injuries and plaintiff-wife's loss of consortium.

The trial court granted Mobilift's motion for summary judgment, based on G.S. 1-50(6), which provides: "No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." By its terms this statute applies to the uncontroverted facts and precludes this action. Plaintiffs do not contend otherwise. They argue only that the statute is unconstitutional and that their forecast of evidence contained matter which should estop Mobilift from pleading the statute.

We find the reasoning of *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983), dispositive of these arguments. While *Lamb* dealt with G.S. 1-50(5) rather than G.S. 1-50(6), both are statutes of repose, and no rational basis appears for treating them differently with respect to the issues presented.

This Court has held that the *Lamb* analysis must apply to both statutes with regard to the constitutional issues. *Colony Hill Condominium I Association v. Colony Company*, 70 N.C. App. 390, 320 S.E. 2d 273 (1984). Pursuant to *Lamb* and *Colony Hill*, we hold that plaintiffs' constitutional arguments do not provide a basis for reversal.

A statute of repose "constitutes a substantive definition of, rather than a procedural limitation on, rights." *Lamb v. Wedgewood South Corp.*, 308 N.C. at 426, 302 S.E. 2d at 872. The effect "is that unless the injury occurs within the six-year period, there is no cognizable claim." *Id.* at 440, 302 S.E. 2d at 880. Commencement of suit within the allotted time is a "condition to the legal cognizability of [the] claim." *Id.* at 444, 302 S.E. 2d at 882.

Walker v. Santos

It is undisputed that plaintiff-husband sustained injuries and plaintiffs brought this action more than six years after Mobilift's sale of the truck to plaintiff-husband's employer. The action thus is simply not cognizable; and the doctrine of estoppel would appear inapplicable. Assuming the contrary, *arguendo*, the forecast of evidence does not raise an estoppel issue against Mobilift.

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

JUDY C. WALKER, ADMINISTRATRIX OF THE ESTATE OF VIRGINIA CRANFILL, DECEASED v. JUAN J. SANTOS, M.D. AND FORSYTH COUNTY HOSPITAL AUTHORITY, INC.

No. 8321SC1214

(Filed 2 October 1984)

Death § 4— wrongful death—time of negligent act—action barred by statute of limitations

Plaintiff's wrongful death action was barred by G.S. 1-15(c) and G.S. 1-53(4) where plaintiff's complaint alleged that defendant treated plaintiff's decedent from 14 January 1966 until 15 March 1966 and decedent died on 10 March 1981 as a result of such allegedly negligent treatment.

Judge BECTON concurring.

APPEAL by plaintiff from *Long, James M., Judge*. Order entered 28 July 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 September 1984.

E. Vernon F. Glenn and David P. Shouvin for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan and Keith A. Clinard, for defendant appellee *Juan J. Santos, M.D.*

WHICHARD, Judge.

Plaintiff commenced this action on 29 April 1983 by filing a complaint. The complaint alleged that defendant-physician administered radiotherapeutic treatment to plaintiff's decedent from

Walker v. Santos

14 January 1966 until 15 March 1966 and that the decedent died on 10 March 1981 “[a]s a result of the faulty and negligently directed and administered” treatment.

The trial court granted defendant-physician’s motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), on the ground that the action was not brought within the time allotted by statute. Plaintiff appeals.

G.S. 1-15(c), with one exception not pertinent here, provides that an action arising out of the performance of or failure to perform professional services shall in no event be commenced more than four years from the last act of the defendant giving rise to the cause of action. G.S. 1-53(4) precludes an action for wrongful death if G.S. 1-15(c) would have barred the decedent, when alive, from bringing an action for bodily harm. These statutes together, by their express terms, preclude the bringing of this action. Nothing else appearing, the court thus properly allowed the Rule 12(b)(6) motion to dismiss. *Small v. Britt*, 64 N.C. App. 533, 307 S.E. 2d 771 (1983); *Roberts v. Durham County Hospital Corp.*, 56 N.C. App. 533, 289 S.E. 2d 875 (1982), *affirmed per curiam*, 307 N.C. 465, 298 S.E. 2d 384 (1983).

Plaintiff argues that we should declare G.S. 1-15(c) unconstitutional. This Court has upheld this statute against constitutional attack based on vagueness, denial of equal protection, and the prohibition against exclusive emoluments. *Roberts, supra*. Neither this Court nor our Supreme Court has passed upon a challenge to G.S. 1-15(c) under the “open courts” provision of Article I, Section 18, of the Constitution of North Carolina. The Supreme Court, however, has upheld G.S. 1-50(5), which is also a statute of repose, against such an attack. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983). This Court has held that the constitutionality of G.S. 1-50(6), still another statute of repose, must also be upheld pursuant to the *Lamb* analysis. *Davis v. Mobilift Equipment Co.*, 70 N.C. App. 621, 320 S.E. 2d 406 (1984); *Colony Hill Condominium I Association v. Colony Company*, 70 N.C. App. 390, 320 S.E. 2d 273 (1984). No rational basis appears for applying to G.S. 1-15(c) a constitutionality analysis different from that which our Supreme Court applied to G.S. 1-50(5) in *Lamb* and which this Court by analogy applied to G.S. 1-50(6) in *Davis* and *Colony Hill*.

Walker v. Santos

We thus find no merit in plaintiff's arguments relating to the constitutionality of G.S. 1-15(c). The order is therefore

Affirmed.

Chief Judge VAUGHN and Judge BECTON concur.

Judge BECTON concurring.

Were I writing on a clean slate, I would be disposed to reverse; however because our Supreme Court, in the cases cited by Judge Whichard, has definitively resolved the statute of repose issue against plaintiff, I am duty-bound to concur and affirm the trial court's order.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 OCTOBER 1984

ENNIS v. ENNIS No. 8311DC1105	Harnett (82CVD0289)	Remanded
REALTY WORLD-TEMPLETON v. HOLTON No. 8324DC1247	Watauga (82CVD298)	Affirmed
STATE v. CRANDALL No. 833SC1238	Pitt (82CRS14921) (82CRS14922) (82CRS14923)	Reversed in part, no error and remanded for resentencing in part
STATE v. HARRELL No. 8320SC1130	Anson (83CRS1460) (83CRS0322)	No Error
STATE v. JACOBS No. 8416SC73	Robeson (83CRS6491)	No Error
STATE v. KNIGHT No. 832SC438	Martin (81CRS4876)	No Error
STATE v. PUGH No. 843SC94	Carteret (83CRS1966)	No Error
STATE v. RILEY No. 8320SC1249	Union (83CRS4129)	No Error

Estrada v. Jaques

MICHAEL ANTHONY ESTRADA v. PAUL F. JAKES, DONALD G. DETWEILER, THOMAS W. POWELL AND JOHN R. MILES

No. 8315SC878

(Filed 16 October 1984)

1. Rules of Civil Procedure § 15— amendment of complaint—relation back to original complaint

Plaintiff's original complaint alleging that defendant surgeons were negligent in failing to obtain his informed consent to a steel coil embolization gave defendants notice of the transactions or occurrences to be proved pursuant to an amendment alleging that defendants were negligent in their treatment of plaintiff after the embolization, including performance of a remedial operation on plaintiff, so that the amendment related back to the filing of the original complaint where: the original complaint contained allegations concerning the consent obtained by defendants to the embolization and the explanation about the complications given to plaintiff by defendants; the original complaint continued with allegations that a subsequent consent was obtained for a remedial operation; the original complaint contained allegations concerning discoveries made during the remedial operation, the failure of that operation, and the subsequent amputation of plaintiff's lower leg; and the remedial operation began only three hours after the end of the embolization. G.S. 1A-1, Rule 15(c).

2. Rules of Civil Procedure § 15— amendment of complaint—absence of prejudice—delay beyond statute of limitations

Defendant surgeons failed to show prejudice in the trial court's allowance of an amendment of the original complaint, which related only to informed consent, to allege negligence by defendants in performing a remedial operation where defendants showed mere delay beyond the statutory period for a claim based on the remedial operation.

3. Courts § 9.3— amendment of complaint—overruling of another judge's order

Where the order of one superior court judge allowed an amendment to the complaint, a second superior court judge exceeded his authority by effectively overruling such order in ruling that the amendment did not relate back to the original complaint so that the claim was barred by the statute of limitations.

4. Appeal and Error § 16.1— no jurisdiction by trial court to dismiss appeal

The trial court had jurisdiction only for the purpose of settling the case on appeal and lacked jurisdiction to dismiss plaintiff's appeal as to two defendants where the session at which the judgment appealed from was rendered had ended, and nothing in the record suggested any intention by plaintiff to abandon his appeal.

Estrada v. Jaques

5. Appeal and Error § 16.1— dismissal of appeal as interlocutory—no jurisdiction in trial court

The trial court was not authorized by the second sentence of App. Rule 25 to dismiss an appeal as interlocutory since the motions referred to in that sentence are only those for failure to comply with the Rules of Appellate Procedure or with court orders requiring action to perfect the appeal.

6. Appeal and Error § 6.2— interlocutory appeal—motion to dismiss—when and where made

A ruling on the interlocutory nature of an appeal is properly a matter for the appellate division, not the trial court, and since this often requires consideration of the merits, a motion to dismiss an appeal as being interlocutory should properly be filed after the record on appeal is filed in the appellate court.

7. Appeal and Error § 2— one panel may not overrule decision of another

A second panel of the Court of Appeals may not exercise its discretion in favor of reviewing an order of the trial division when a preceding panel has decided to the contrary.

8. Pleadings § 42.1; Rules of Civil Procedure § 12— striking allegations in amended complaint

The trial court properly struck informed consent allegations from an amended complaint on the ground that such allegations had already been disposed of in a summary judgment ruling. G.S. 1A-1, Rule 12(f).

9. Appeal and Error § 6.2— summary judgment orders—failure to dispose of all claims—affecting substantial right—immediate appeal

Although summary judgment orders disposing of informed consent claims against defendant surgeons failed to adjudicate negligent performance claims and were thus interlocutory, they affected a substantial right and were immediately appealable since (1) a jury in a trial solely on the negligent performance claim could find that an embolization procedure *was* experimental and that defendant surgeons were not negligent in failing to diagnose plaintiff's post-operative condition quickly, and if the orders relating to informed consent were reversed on a subsequent appeal, a second jury could thereafter find that the embolization procedure *was not* experimental and that defendant surgeons were not negligent in informing plaintiff of the risks of the procedure, and (2) many of the facts to be proved under each claim are identical or very closely related in time, the case is extremely complicated, and trial will require substantial expert testimony on both sides at considerable expense.

10. Physicians, Surgeons, and Allied Professions § 17.1— informed consent—burden of proof

In a medical malpractice case in which defendant surgeons relied on the adequacy of plaintiff's actual consent to a surgical procedure, defendants had to show conclusively (1) the circumstances surrounding the consent, (2) the risks inherent in the procedures offered, (3) the standard in the community for obtaining consent and (4) that the standard was met under the circumstances.

Estrada v. Jaques

Only then did the burden devolve upon plaintiff to produce any evidence to rebut the validity of the consent. G.S. 90-21.13.

11. Physicians, Surgeons, and Allied Professions § 17.1— informed consent—effect of signed consent form

A signed consent form constitutes only some evidence of valid consent in a medical malpractice case, and summary judgment may not be granted solely thereon when the adequacy of the underlying representations is disputed.

12. Physicians, Surgeons, and Allied Professions § 17.1— failure to obtain informed consent—summary judgment for surgeons improper

Summary judgment was improperly entered for defendant surgeons in a malpractice action based on alleged negligence by defendants in failing to obtain plaintiff's informed consent to a surgical procedure where defendants failed to show that plaintiff was informed of the risks and hazards of the procedure when applied to the peripheral arteries operated on in plaintiff's case, and where defendants failed to relate their actions in obtaining consent to the standards of practice among members of the same health care profession. G.S. 90-21.13(a)(1) and (2).

13. Physicians, Surgeons, and Allied Professions § 17.1— experimental procedure or treatment— informed consent

A health care provider who offers an experimental procedure or treatment to a patient has a duty, in exercising reasonable care under the circumstances, to inform the patient of the experimental nature of the proposed procedure and the known or projected most likely risks thereof.

APPEAL by plaintiff from *Giles R. Clark, Judge and Barnette, Judge*. Orders entered 11 April 1983 and 8 June 1983 and judgment entered 13 June 1983, in Superior Court, ORANGE County. Heard in the Court of Appeals 9 May 1984.

McCain & Essen, by Jeff Erick Essen and Grover C. McCain, Jr., for plaintiff appellant.

Yates & Fleishman, by Joseph W. Yates, III, for defendant appellees Thomas W. Powell and John R. Miles.

No brief for defendant appellees Paul F. Jaques and Donald G. Detweiler.

BECTON, Judge.

This is a complex medical negligence action. Plaintiff appeals from various rulings on motions to amend pleadings, for summary judgment, and to compel discovery.

Estrada v. Jaques

THE MEDICAL FACTS

Plaintiff, Michael Estrada, worked in a tavern in Chapel Hill and was shot in the knee by a disruptive customer on 16 May 1979. His wound was treated at North Carolina Memorial Hospital (NCMH), with no apparent complications. Estrada developed a mass in his leg, however, and was readmitted to NCMH on 17 June 1979. The mass apparently resulted from a false aneurysm, a weakened spot in an arterial wall, which was probably caused by the passage of the bullet. Defendants Jaques and Detweiler (the radiologists) confirmed this diagnosis and consulted with defendants Powell and Miles (the surgeons) as to the proper treatment.

The surgeons agreed to the radiologists' advice that the false aneurysm be treated by means of a percutaneous steel coil embolization. Basically, this procedure, still relatively new, involved insertion of a small steel coil into the weakened artery upstream from the false aneurysm, thereby cutting off the flow of blood and preventing a rupture. The radiologists were to perform the embolization. The surgeons discussed the procedure with Estrada and obtained a signed consent from him on 18 June 1979.

At 3:00 that afternoon, the radiologists performed the embolization. At 3:30 Estrada was returned to his room, complaining that his leg was giving him severe pain. Symptoms indicated that the blood supply to the lower leg was inadequate. Estrada received anti-coagulants to prevent clotting in the capillaries in his leg, and was taken back to the operating room at 6:00 p.m. The surgeons operated for the next 16 hours, attempting to restore the flow of blood to Estrada's leg. By the time they were able to bypass the blocked area, the capillaries in Estrada's leg had ceased to function from the protracted lack of fresh blood and resultant clotting. Estrada's lower leg was amputated on 19 June 1979. Further facts are set out as necessary in the opinion.

THE PROCEDURAL HISTORY

Estrada brought the present action against all four defendants on 26 May 1981. The original complaint alleged that the surgeons were negligent in obtaining his consent, in that they did not inform him of the "highly experimental" nature of the steel coil embolization. As to the radiologists, the complaint alleged similar negligence in failing to explain the experimental nature of

Estrada v. Jaques

the procedure to Estrada, as well as negligence in their explanation to the surgeons and in the actual performance of the operation. The four defendants together filed an answer which admitted that the embolization was experimental, but denied any negligence. Within 30 days thereafter, the radiologists filed a separate Amended Answer which denied that the procedure was experimental. The surgeons filed a substantially identical Amended Answer.

Following discovery, the defendants filed motions for summary judgment in September 1982. Estrada moved to amend his complaint on 15 October 1982, seeking to add allegations of negligence on the part of the surgeons in their supervision and treatment of Estrada following the embolization procedure, including the remedial 16-hour operation, as well as allegations of negligence on the part of the radiologists in failing to recognize complications following the embolization. Hearing on the motions took place on 25 October 1982; the trial court granted summary judgment to all defendants on the informed consent claims, but denied the radiologists' motion with respect to the allegations of negligence by them in performing the embolization. At the same time, the court also allowed Estrada thirty days to file an Amended Complaint including the allegations of negligent treatment by the surgeons, but denied the remainder of his motion. The order was filed 29 November 1982 but, apparently because of a clerical error, Estrada never received a copy.

Upon Estrada's further discovery requests, the surgeons objected, contending that they were no longer in the case. Estrada filed a motion to amend the 29 November 1982 order, alleging non-receipt thereof and seeking (1) a corrected order allowing additional time to file an Amended Complaint and (2) a ruling that the amendment would relate back to the hearing of 25 October 1982. Judge Giles R. Clark allowed the motion by order dated 11 April 1983, and Estrada filed his Amended Complaint the next day. The Amended Complaint simply renewed verbatim the original allegations of negligence and added the portions allowed by the order of 29 November 1982. The surgeons responded, (1) contesting the trial court's jurisdiction to allow a new claim while granting summary judgment, (2) raising a statute of limitations defense, and (3) moving to strike the informed consent issue. The

Estrada v. Jaques

radiologists responded denying negligence and also moving to strike the informed consent allegations.

By order dated 8 June 1983, trial Judge Barnette allowed the radiologists' motion to strike the informed consent allegations, and allowed certain portions of a motion by Estrada to compel discovery against the radiologists. By separate judgment dated 15 June 1983, Judge Barnette reaffirmed the dismissal of the informed consent allegations against the surgeons. In addition, he ruled that the allegations of negligence added by the amendment were interposed at the time of hearing in October 1982, not at the time of the original complaint, 26 May 1981; thus, the three-year statute of limitations barred them, and Judge Barnette awarded summary judgment on all claims as to the surgeons. Estrada appeals.

I

[1] The first question presented is whether the court erred in granting the surgeons' motion for summary judgment on the negligence claim relating to their treatment of Estrada following the embolization. The judgment is presently appealable, since the trial court certified that there was no just reason for delay. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1983). The judgment rested on the court's conclusion that the allegations, ruled to relate back to 25 October 1982, were nonetheless filed after the statute of limitations had expired and did not relate back to the original complaint.

Estrada's injuries occurred in June of 1979 and the applicable statutes of limitation require actions to be brought within three years. N.C. Gen. Stat. § 1-15(c) (1983); N.C. Gen. Stat. § 1-52(16) (1983). Estrada urges that the surgeons were put on notice of the occurrences underlying the claim, and therefore the court erred in ruling that the amendment did not relate back to the original filing of the suit in 1981 and granting summary judgment accordingly. The surgeons urge affirmance on the ground that Estrada in essence attempted to allege a new cause of action.

The critical statutory language is found in N.C. Gen. Stat. § 1A-1, Rule 15(c) (1983):

A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original

Estrada v. Jaques

pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

This rule, unlike the remainder of Rule 15, is drawn from Rule 3025 of the New York Civil Practice Law and Rules. G.S. § 1A-1, Rule 15, Comment (1983). Rule 15(c) provides for a liberal standard for relation back of amendments:

The amended pleading will . . . relate back if the new pleading merely amplifies the old cause of action, or now even *if the new pleading constitutes a new cause of action*, provided that the defending party had originally been placed on notice of the events involved. For example, an amended cause of action for damages for breach of a contract would relate back where the original pleading alleged an action in equity to rescind the contract for fraud. (Emphasis added.)

Id., quoting H. Wachtell, *N.Y. Practice Under the C.P.L.R.* 141 (2d ed. 1963). Under the New York practice, amendments are allowed liberally, "almost as a matter of course." *In re Robillard's Will*, 136 N.Y.S. 2d 79, 80 (1951). This is consistent with the stated policy of the rules that leave "shall be freely given." G.S. § 1A-1, Rule 15(a) (1983).

Our Supreme Court has recently considered the application of Rule 15(c) in *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984). The Court declined to attempt a judicial exegesis of the rule, instead allowing it to speak for itself: the decisive test for relation back remains *notice* in the original pleading of the transactions or occurrences to be proved pursuant to the amended pleading. Applying this test, the *Henry* court ruled that the original complaint contained only allegations which *negated* the possibility of actionable negligence sought to be raised in the amendment. The original complaint repeatedly alleged that one defendant, Dr. Niazi, had never consulted with or advised the treating defendants, but had instead engaged in a civil conspiracy to create a false record of such consultation. The proposed amendment, entirely to the contrary, alleged that Dr. Niazi did actually and negligently advise the other defendants. It added a claim of negligence against Dr. Niazi, in addition to the original civil conspiracy

Estrada v. Jaques

claim. The Court, Justices Martin and Frye dissenting, reversed this Court and upheld the trial court's denial of leave to amend.

In the present case, on the other hand, the original Complaint contained allegations concerning the consent obtained by the surgeons to the original steel coil embolization, and the explanation about the complications given to Estrada by the surgeons. The original Complaint continued with allegations that a subsequent consent was obtained for the remedial operation. More important, it contained allegations regarding discoveries made during that operation, the attempted, but failed, repair and graft undertaken during that operation, and a final allegation that, because of the damage to the arteries, Estrada's leg was amputated. The Complaint did not specify which damage caused the amputation—that caused by the steel coil or any subsequent procedure. Significantly, in light of *Henry v. Deen*, it did not in any way negate the possibility that the surgeons contributed significantly to the amputation by their negligence in performing the remedial operation. The original Complaint did allege negligence on the part of the surgeons, although only with respect to the informed consent issue. The Amended Complaint simply alleged that they were further negligent in their *treatment* of Estrada and provided seven particulars involved in the operation they performed beginning only three hours after the first one. On these pleadings, we hold that the surgeons had "notice of the transactions, occurrences, or series of transactions" in the original complaint, and that, therefore the Amended Complaint related back. G.S. § 1A-1, Rule 15(c) (1983). Our holding finds support in the opinion of Judge, now Chief Judge Vaughn in *Clary v. Nivens*, 12 N.C. App. 690, 184 S.E. 2d 374 (1971): *Clary* held that a malicious prosecution claim related back to the filing of a false arrest action, since at the very least the original pleadings placed the defendants "on notice of the events involved." 12 N.C. App. at 692, 184 S.E. 2d at 376. These defendants also had notice of the events involved; the court thus erred in granting them summary judgment for lack of relation back.

A review of New York and federal cases underscores the correctness of our ruling. In a case quite similar to the present one, an amendment adding an informed consent count to the original medical malpractice claim was allowed. *Hodaba v. Lippert*, 64 A.D. 2d 691, 407 N.Y.S. 2d 574 (1978). And in another case the

Estrada v. Jaques

court allowed addition of a breach of contract claim to a malpractice claim already barred by the statute of limitations. *In re Robillard's Will*. See also *Tobias v. Kessler*, 18 A.D. 2d 1094, 239 N.Y.S. 2d 554 (1963) (allowing malpractice claim to relate back to original assault and trespass claims). It is recognized that the federal rule on relation back is more restrictive than the North Carolina rule. *Humphries v. Going*, 59 F.R.D. 583 (E.D.N.C. 1973). Yet under the federal rule, an amendment has been allowed adding a cause of action for negligently entrusting an automobile to an alcoholic to an original personal injury claim. *Id.* Under *Humphries*, "as long as a plaintiff adheres to a legal duty breached or an injury originally declared on, an alteration of the modes in which defendant has breached the legal duty or caused the injury is not an introduction of a new cause of action." 59 F.R.D. at 587. (Emphasis added.) *Humphries* relied on *Davis v. Yellow Cab Co.*, 35 F.R.D. 159 (E.D. Pa. 1964), in which the court allowed plaintiff to add an amendment, alleging that defendant had negligently allowed its cab to roll forward injuring plaintiff, to an original complaint that defendant had negligently failed to assist plaintiff in entering the cab. These precedents clearly support our ruling that the amendment relates back in this case.

The surgeons argue that *Jirovec v. Maxwell*, 483 S.W. 2d 852 (Tex. Civ. App. 1972) requires a contrary result. Plaintiff in *Jirovec* originally sued for malpractice occurring during an operation in March. After the statute of limitations had expired, plaintiff attempted to add an amendment alleging malpractice during a corrective operation in October. The *Jirovec* Court ruled that the amendment arose out of a wholly distinct and different transaction. In this case, however, the alleged malpractice began within *three hours*, not seven months, after the end of the first operation, and the second operation was in fact described in the original complaint. *Jirovec* is inapposite.

[2] The surgeons also claim unfair prejudice from allowing the amendments. As the party opposing amendment, they carry the burden of demonstrating prejudice. *Henry v. Deen*, 61 N.C. App. 189, 300 S.E. 2d 707 (1983), *rev'd on other grounds*, 310 N.C. 75, 310 S.E. 2d 326 (1984). They argue simply that Estrada waited more than three years to amend and thereby unfairly surprised them with his new allegations of negligence. In a complicated medical malpractice case such as this one, however, and par-

Estrada v. Jaques

ticularly when, as here, discovery has been hotly contested and important evidence turns up missing, merely showing delay beyond the statutory period will not suffice. To hold otherwise would negate the very policies embodied in Rule 15, *i.e.*, liberal allowance of amendments, and availability of relation back, to ensure that controversies are decided on the merits. *See Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972). The record does not disclose any attempt by the surgeons to show any other substantial grounds for their claim of unfair prejudice. Under the case law, the surgeons therefore failed to carry their burden. *See Ledford v. Ledford*, 49 N.C. App. 226, 271 S.E. 2d 393 (1980) (reasons must be set out in record), *relying on Foman v. Davis*, 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227 (1962) (requirement of showing of undue delay, bad faith, dilatory motive, failure to cure deficiency by previous amendment, futility, or undue prejudice). *See also Ciccone v. Glenwood Holding Corp.*, 44 Misc. 2d 273, 253 N.Y.S. 2d 576 (1964) (undue prejudice when proposed amended answer raised affirmative defense of exclusivity and alleged exclusive remedy time-barred); *Perez v. Chutick & Sudakoff*, 50 F.R.D. 1 (S.D.N.Y. 1970) (amendment which would have added warranty claim unduly prejudicial when time for impleading third party thereon past). We conclude again that the trial court should not have granted summary judgment on the Amended Complaint.

[3] The procedural posture of this portion of the case further supports this conclusion. Judge Clark's 11 April 1983 order in fact allowed the amendment, and Estrada thereafter timely filed his Amended Complaint. The 11 April 1983 order stated only that the amendment related back to the 25 October 1982 hearing. The 11 April order did not reserve judgment as to the statute of limitations question. We presume that the court did not allow the amendment as a mere pointless gesture. We will *not* presume that having heard argument and allowed the amendment, Judge Clark then expected Estrada to affirmatively seek a ruling that the amendment thus allowed related back. The law does not require performance of vain acts. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977). By allowing the surgeons' motion for summary judgment on the statute of limitations defense in his order of 15 June 1983, however, Judge Barnette effectively overruled Judge Clark's prior determination; by ruling that the amendment did not relate back, he effectively denied Estrada's already granted

Estrada v. Jaques

motion. This he lacked authority to do. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972) (second judge may not allow motion to amend previously denied absent changed circumstances); *State v. Standard Oil Co.*, 205 N.C. 123, 170 S.E. 134 (1933) (second judge must observe terms of order allowing amendment). No change of circumstances occurred between 11 April and 15 June 1983 which would justify Judge Barnette's ruling that the amendment did not relate back. See *Calloway*.

For all of the foregoing reasons, we therefore hold that Judge Barnette erred in granting summary judgment for the surgeons on their statute of limitations defense. That portion of the order of 15 June 1983 must therefore be reversed.

II

Estrada also attempts to appeal from various orders dismissing his appeal as to the radiologists. As noted above, the radiologists had obtained summary judgment on the informed consent claims against them; the negligent performance claims against them were unaffected and remain to be tried. Estrada gave notice of appeal on 16 June 1983; he filed the record on appeal with this Court on 16 August 1983. Before the record was filed, however, on 27 July 1983, the radiologists moved in the Superior Court to dismiss Estrada's appeal as to them. Trial Judge Smith granted the motion, ruling that the orders appealed from were "interlocutory in nature." Therefore, before reaching the merits of this portion of the case, we must first determine whether or not it is properly before this Court.

A

[4] The general rule is that an appeal takes the case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the trial judge is *functus officio*. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971), *reh'g denied*, 281 N.C. 317 (1972); *American Floor Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E. 2d 659 (1963). The enactment of N.C. Gen. Stat. § 1A-1, Rules 59 and 60 (1983) did not change this rule. *Wiggins*. It is subject to two exceptions and one qualification:

The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1)

Estrada v. Jaques

during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that 'the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned' and thereby regain jurisdiction of the cause. [Citation omitted.]

Bowen v. Hodge Motor Co., 292 N.C. 633, 635-36, 234 S.E. 2d 748, 749 (1977).

We take judicial notice that Judge Smith presided over a new Session of Orange County Superior Court which began 25 July 1983. Accordingly, the first exception does not apply. And nothing in the record suggests any intention on Estrada's part, either express or implied, to abandon his appeal. Therefore the Superior Court had jurisdiction on 27 July 1983 only for the purpose of settling the case on appeal. *Id.* The record contains no indication of any dispute over the contents of the record, of any undue delay by Estrada in filing and serving a proposed record on appeal, or of any other matter which might allow the trial court to dismiss the appeal for failure to expeditiously and properly settle the record. It appears that Judge Smith lacked jurisdiction to dismiss the appeal.

B

[5] We note that the trial division does possess limited authority to dismiss appeals under Rule 25 of the Rules of Appellate Procedure. That Rule provides:

RULE 25

DISMISSAL FOR FAILURE TO COMPLY WITH RULES

If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by af-

Estrada v. Jaques

fidavits or certified copies of docket entries which show the failure to take timely action or otherwise to perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

4A N.C. Gen. Stat. App. I (2A), R. App. P. 25 (Supp. 1983). Taken out of context, the second sentence of the Rule might provide the trial court with authority to dismiss interlocutory appeals. However, elementary principles of construction require that words and phrases be interpreted contextually and in harmony with the underlying purposes of the whole. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). The title and first and third sentences clearly indicate that the motions described in the second sentence are *only* those for failure to comply with the Rules of Appellate Procedure or with court orders requiring action to perfect the appeal. The commentary makes this interpretation even clearer. See 4A N.C. Gen. Stat. App. I (2A), R. App. P. 25, Drafting Committee Note. Notably absent from the commentary is any suggestion that the drafters intended to alter existing case law. See *Bowen v. Hodges Motor Co.* In fact, our interpretation of the Rule accords entirely with the case law, and only a narrow focus on one part of the Rule suggests anything to the contrary. Accordingly, we hold that Judge Smith acted beyond his authority in dismissing the appeal as to the radiologists as interlocutory.

C

[6] A further consideration supports this conclusion: G.S. § 1A-1, Rule 54(b) (1983) and N.C. Gen. Stat. § 7A-27(c) (1981) do not absolutely bar appeals from other than final judgments. Orders which are technically interlocutory may properly be appealed, regardless of lack of certification under Rule 54(b), if they affect a "substantial right." N.C. Gen. Stat. § 1-277(a) (1983); N.C. Gen. Stat. § 7A-27(d) (1981); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976). A variety of orders, including orders of the sort Estrada attempts to appeal from, have been held to affect a substantial right and thus to be immediately appealable. See generally 1 Strong's North Carolina Index 3d *Appeal and Error* § 6.2 (1976). The appellate division possesses sufficient authority to dispose of interlocutory appeals which do

Estrada v. Jaques

not affect a substantial right by dismissal. It has express authority to do so on motion of the parties if the appeal is frivolous or taken solely for purposes of delay. 4A N.C. Gen. Stat. App. I (2A), R. App. P. 34 (Supp. 1983). Or it may exercise its general authority in response to motions filed under the general motions provision. 4A N.C. Gen. Stat. App. I (2A), R. App. P. 37. Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. No hard and fast rules exist for determining which appeals affect a substantial right. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). Rather, such decisions usually require consideration of the facts of the particular case. *Id.* Therefore, ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court. Since this often requires consideration of the merits, we note for the benefit of the bar that motions to dismiss appeals as being interlocutory should properly be filed *after* the record on appeal is filed in the appellate court.

D

We have held that Judge Smith had no authority to dismiss the appeal as to the radiologists. Depending on our interpretation of the legal basis of the order, we could either: (1) treat Estrada's appeal as an application for certiorari, grant same, and consider the merits, N.C. Gen. Stat. § 7A-32(c) (1981); 4A N.C. Gen. Stat. App. I (2A), R. App. P. 21(a)(1) (Supp. 1983); *Ziglar v. E. I. DuPont de Nemours and Co.*, 53 N.C. App. 147, 280 S.E. 2d 510, *disc. rev. denied*, 304 N.C. 393, 285 S.E. 2d 838 (1981); or (2) treat the order as in excess of authority and void *ab initio*, and consider the purported appeal, assuming the substantial right doctrine applies, as properly before us. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E. 2d 793 (1982) (order beyond authority of trial court void *ab initio*); *State ex rel. Comm'r of Ins. v. Rate Bureau*, 61 N.C. App. 262, 300 S.E. 2d 586, *disc. rev. denied*, 308 N.C. 548, 304 S.E. 2d 242 (1983) (situation becomes as it was prior to void order). However, the present posture of the case in this Court makes either result impossible.

[7] Estrada has already petitioned this Court for a writ of certiorari to review both Judge Smith's order dismissing his appeal as to the radiologists and the underlying orders appealed from. A different panel of this Court denied the petition on 18 August

Estrada v. Jaques

1983. Our Supreme Court has recently and firmly ruled that a second panel of this Court may not exercise its discretion in favor of reviewing an order of the trial division when a preceding panel has decided to the contrary. *North Carolina Nat'l Bank v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629, *reh'g denied*, 307 N.C. 703 (1983). We, therefore, may not treat Estrada's purported appeal as a petition for writ of certiorari.

Since Estrada also unsuccessfully petitioned for certiorari to review the underlying orders from which he attempts to appeal, and since a decision of this panel that the prior order was void and the orders are immediately appealable would effectively overrule the decision of the previous panel, we also do not treat the appeal as before us as of right. As discussed above, this does not mean that Judge Smith's order is valid, but that we will not disturb it in the unusual procedural posture of this case.

In addition, the radiologists, having succeeded in having the appeal as to them dismissed, did not participate in the settling of the record on appeal and have not submitted a brief. Under the circumstances, their failure to participate is understandable. It would thus be unfair to consider the merits of Estrada's appeal as to them. Therefore, the appeal is dismissed as to the defendant radiologists Jaques and Detweiler. Estrada's negligent performance claims against the radiologists remain to be tried, and his informed consent claim must wait appeal until a final judgment thereon.

III

[8] The certified judgment appealed from also struck from the amended complaint the informed consent allegations against the surgeons, which, together with the ruling that the negligence allegations did not relate back, effectively removed all actionable allegations against the surgeons. The court struck the allegations on the ground that they had already been disposed of by the summary judgment ruling of 25 October 1982 and were therefore irrelevant, immaterial and impertinent.

The trial court relied on N.C. Gen. Stat. § 1A-1, Rule 12(f) (1983) as authority for striking the allegations. Rule 12(f) allows the court to strike improper allegations from "any pleading." Although the reported cases do not address application of Rule

Estrada v. Jaques

12(f) to allegations added under G.S. § 1A-1, Rule 15, the latter rule clearly governs pleadings practice, and motions to strike logically are available to test amended as well as original complaints. The purpose of Rule 12(f) is to avoid expenditure of time and resources before trial by removing spurious issues, whether introduced by original or amended complaint. See *Sidney-Vinstein v. A. H. Robins Co.*, 697 F. 2d 880 (9th Cir. 1983) (construing identical federal rule); 2A J. Moore & J. Lucas, *Moore's Federal Practice* § 12.21 (2d ed. 1984). The trial court clearly acted correctly in granting the motion to strike.

IV

[9] Estrada urges that we go beyond the certified judgment and consider the merits of the underlying orders. The orders themselves disposing of the informed consent allegations against the surgeons are interlocutory. They adjudicated "fewer than all the claims" and the trial court did not certify that there existed no just reason for delay in entering judgment thereon. Therefore no appeal would ordinarily lie. G.S. § 1A-1, Rule 54(b) (1983). The petition for certiorari previously denied also requested review of the underlying orders relative to these defendants, the surgeons, so that for the reasons discussed in the previous section we cannot treat this as a petition for certiorari under G.S. § 7A-32(c) (1981). *North Carolina Nat'l Bank v. Virginia Carolina Builders*. Therefore, the only way these orders may be reviewed is if they affect a substantial right and are appealable of right. G.S. § 1-277(a) (1983); G.S. § 7A-27(d) (1981).

Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). The necessity of a second trial, standing alone, does not affect a substantial right. *Blackwelder v. Dep't of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983). However, in certain cases the appellate courts have held that a plaintiff's right to have all his claims heard before the same jury affects a substantial right. *Bernick v. Jurden* (possibility of inconsistent verdicts); *Swindell v. Overton*, 62 N.C. App. 160, 302 S.E. 2d 841 (1983), *rev'd on other grounds*, 310 N.C. 707, 314 S.E. 2d 512 (1984).

Estrada v. Jaques

In the trial solely on the *negligent performance issue* in this case, a jury could find that the embolization procedure *was* experimental, and that the surgeons were therefore not negligent in failing to diagnose Estrada's post-operative condition quickly, as alleged in the Amended Complaint. Then, if the orders relating to *informed consent* were reversed on a subsequent appeal, a second jury could thereafter find that the embolization procedure *was not* experimental, and that the surgeons were not negligent in informing Estrada of the risks of the procedure. Further, many of the facts to be proved under each claim are identical and/or very closely related in time, and the case is extremely complicated. See *Swindell v. Overton*. Trial will undoubtedly require substantial expert testimony on both sides at considerable expense. *Harrell v. Harrell* (expense of interlocutory procedure justified immediate appeal); *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E. 2d 493 (1963) (estate available to creditors diminished by interlocutory costs; immediately appealable). Accordingly, we hold that a substantial right is affected and this portion of the appeal is before this Court of right.

A

The underlying order in question granted summary judgment to the surgeons. Summary judgment is appropriate when the movant establishes a complete defense, *Ballinger v. N.C. Dep't of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982), *cert. denied*, 307 N.C. 576, 299 S.E. 2d 645 (1983), or when there is no genuine issue of material fact. *Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979). In considering such motions, the court must accept the evidence in favor of the non-movant in the light most favorable to that party, with all favorable inferences therefrom. *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974). The court must consider all papers before it, including the pleadings. See *Seay v. Allstate Ins. Co.*, 59 N.C. App. 220, 296 S.E. 2d 30 (1982). Since questions of reasonable care under the circumstances constitute the controverted issues in negligence cases, such as this one, summary judgment is less suitable. *Bernick v. Jurden*.

B

Summary judgment here was on allegations that the surgeons were negligent in failing to obtain Estrada's informed con-

Estrada v. Jaques

sent. Such causes of action fall under the purview of N.C. Gen. Stat. § 90-21.13 (1981), which provides in relevant part:

(a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the patient's spouse, parent, guardian, nearest relative or other person authorized to give consent for the patient where:

- (1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and
- (2) A reasonable person from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or
- (3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

(b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact.

(c) A valid consent is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent.

Estrada v. Jaques

Under subsection (b), a signed consent, as was obtained in the present case, is presumed valid only if it "meets the foregoing standards," clearly those of subsection (a). The consent form itself is not conclusive. In order to obtain summary judgment, the physician-defendant must establish, as a matter of law, that the informed consent was obtained in accordance with the professional standard of practice in the community, subsection (a)(1), and that under the circumstances a reasonable person would have the requisite general understanding, subsection (a)(2). Since the general understanding must be of the "procedures or treatments and of the usual and most frequent risks and hazards" inherent therein, subsection (a)(2), the physician-defendant must also establish those risks and hazards. Or, the defendant may establish that if such procedures *had* been followed, a reasonable person would have consented, under the circumstances, subsection (a)(3). In either case, the question is one of reasonableness under the circumstances. Defendants' burden becomes a heavy one indeed, since questions of reasonableness must ordinarily go to the jury. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978).

[10] In the present case, since the physicians chose to prove the adequacy of the actual consent, they had to show conclusively (1) the circumstances surrounding the consent, (2) the risks inherent in the procedures offered, (3) the standard in the community for obtaining consent and (4) that the standard was met under the circumstances. Only then did the burden devolve upon Estrada to produce any evidence to rebut the validity of the consent. *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974) (when burden shifts).

The decisions of other states which have adopted similar statutes support our interpretation of the North Carolina statute. See *LaCaze v. Collier*, 416 So. 2d 619 (La. App. 1982), *aff'd*, 434 So. 2d 1039 (La. 1983) (Dennis, J., concurring at 437 So. 2d 869 (La. 1983)) (La. Rev. Stat. Ann. § 40:1299.40 (West 1977)) (proof of risks required); *Valcin v. Public Health Trust*, --- So. 2d --- (Fla. App. 1984) (Fla. Stat. Ann. § 768.46 (West Cum. Supp. 1984)) (expert evidence required). In *Valcin* the Court reversed a summary judgment for the defendant hospital, holding under virtually identical statutory language that the presumption of validity could not attach on such a motion until the defendants had conclusively shown what information was required by standard prac-

Estrada v. Jaques

tice to be conveyed to the patient under the circumstances. "Simply stated, no presumption of a valid consent will arise unless the consent is an informed consent." --- So. 2d at ---.

[11] The General Assembly of North Carolina similarly chose not to give the signed consent form conclusive weight. *Compare* Ga. Code Ann. § 31-9-6 (1982) and *Simpson v. Dickson*, 167 Ga. App. 344, 306 S.E. 2d 404 (1983) (form describing treatment conclusive). The form thus constitutes only *some* evidence of valid consent, and summary judgment may not be granted solely thereon when, as here, the adequacy of the underlying representations is disputed.

C

[12] We have reviewed the mass of depositions filed in this cause with care, and conclude that they do not justify summary judgment for the surgeons.¹ The physical condition of Estrada's leg before the operations and his general health appear undisputed.

At the time of the interview at which the procedures were offered, however, the evidence conflicted as to Estrada's ability to understand the situation. The surgeons' testimony indicated that he was alert and appeared able to comprehend their explanations; in addition, Estrada himself admitted in his deposition that he had no trouble understanding and had no unanswered questions. The only attempt by Estrada to contradict these admissions consisted of a physician's affidavit that the medications administered prior to the interview rendered Estrada incapable of giving consent. Other than conclusory statements that Estrada was incapable of giving his consent, the affidavit does not appear to set forth "specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (1983). Clearly non-expert opinion on ultimate issues may not be relied on to defend against summary judgment. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E.

1. We note that filing of depositions in support of summary judgment is permissive. N.C. Gen. Stat. § 1A-1, Rule 56(e) (1983). It would undoubtedly facilitate decision-making at the trial court and appellate levels if, rather than allowing parties to dump upon them hundreds of pages of testimony, much of it irrelevant (as in the present case), the trial courts required movants for summary judgment to make at least some effort to identify what they contend would justify summary judgment in their favor.

Estrada v. Jaques

2d 400 (1972). Whether expert opinion on ultimate issues so presented may be relied on is not clear. See *Mann v. Virginia Dare Transp. Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973) (expert allowed to give positive opinion at trial); N.C. Gen. Stat. § 8C-1, Rule 704 (Supp. 1983) (effective 1 July 1984); see under *Federal Rule Case & Co. v. Bd. of Trade*, 523 F. 2d 355 (7th Cir. 1975) (admissibility at trial determinative); compare *Mapco, Inc. v. Carter*, 573 F. 2d 1268 (Emer. Ct. App.), cert. denied, 437 U.S. 904, 57 L.Ed. 2d 1134, 98 S.Ct. 3090 (1978) (considered only under exceptional circumstances). We will assume without deciding that the affidavit carried no evidentiary weight.

D

Even with the foregoing assumption, the surgeons failed to satisfy the second requirement of subsection (a)(2) conclusively. It is clear that Estrada understood the procedures offered. However, under the statute, knowledge of the procedures does not suffice; the patient must also be informed of their "usual and most frequent risks and hazards." G.S. § 90-21.13(a)(2) (1981). Obviously, Estrada could only understand *what the surgeons told him*. A careful reading of his whole deposition leads to the conclusion that they informed Estrada only of the risks inherent in the standard surgical procedure and the chance that the embolization might not work. The various depositions of the hospital personnel reflect at best a vague knowledge of the risks of embolization in this sort of case. This knowledge, on the present record, is traceable exclusively to a single medical article and to the ill-defined experience of one of the radiologists, apparently including only one prior operation, with little to suggest he communicated it to the surgeons. There was some evidence that steel coil embolizations had been used in other parts of the body with low risk, but nothing to show why that knowledge should automatically apply to the peripheral arteries operated on in this case.

This omission is critical in light of the evidence that such arteries presented additional difficult problems of size and accessibility. We conclude that this evidence failed to satisfy the surgeons' burden of proof.

E

Our review of the depositions also reveals no testimony addressing "the standards of practice among members of the same

Estrada v. Jaques

health care profession" and the relation, if any, of the actions of the surgeons in obtaining Estrada's consent to such standard. G.S. § 90-21.13(a)(1) (1981). The surgeons described generally their usual procedure, but did not attempt to relate it to any standard professional practice. Again, they failed to meet their burden. As we have indicated above, they cannot rely solely on the admissions of Estrada to obtain summary judgment. We conclude that in obtaining consent, the surgeons failed to show conclusively that their actions were reasonable under the circumstances, and summary judgment in their favor was error.

F

[13] Since in light of our interpretation of G.S. § 91-20.13 (1981), the matter will certainly arise upon remand, we address a further feature of the case. Estrada argues that the embolization procedure was experimental and that the surgeons had a duty to so inform him. In their initial Answer, all defendants admitted that the embolization procedure was experimental. Although their Amended Answers denied this, the original Answer remained admissible against them. See *Stone v. Guion*, 222 N.C. 548, 23 S.E. 2d 907 (1943) ("always admissible"); Annot., 52 A.L.R. 2d 516, 533-40 (1957); 3 J. Moore, *Moore's Federal Practice* § 15.08[7] (2d ed. 1984) (admissible though not conclusive). Repeated discovery requests revealed only the one article and one operation mentioned above, and only general assertions of personal experience, none by the surgeons. This constituted substantial evidence that the procedure as used was in fact experimental.

Accepting this evidence as true, the consent obtained failed to satisfy the statutory requirements. The statute requires "a general understanding . . . of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments *which are recognized and followed by other health care providers*. . . ." G.S. § 90-21.13(a)(2) (1981) (emphasis added). While the emphasized language is not entirely clear, it appears to require that informed consent be obtained to *established* procedure or treatments. Obviously, experimental procedures, by their very untested nature, do not fall within the category of practices described. Just as obviously, on the other hand, medical innovation must go forward, and there will also be some cases in which no recognized procedure will offer any prospect of success. We do

Estrada v. Jaques

not believe the legislature intended to preclude any valid consent to experimental procedures.

Instead, we hold that where the health care provider offers an experimental procedure or treatment to a patient, the health care provider has a duty, in exercising reasonable care under the circumstances, to inform the patient of the experimental nature of the proposed procedure. With experimental procedures the "most frequent risks and hazards" will remain unknown until the procedure becomes established. If the health care provider has a duty to inform of *known* risks for *established* procedures, common sense and the purposes of the statute equally require that the health care provider inform the patient of any *uncertainty* regarding the risks associated with *experimental* procedures. This includes the experimental nature of the procedure and the *known or projected most likely risks*. The evidence presented in this case illustrates the logic of our holding perfectly: taken in Estrada's favor, it shows that the surgeons presented a full picture of the risks of the surgical procedure and simply advised him that the embolization might not work, without informing him of its experimental nature and their consequent lack of knowledge of the risks of whether it would fail or not. Not surprisingly, Estrada chose the experimental procedure. Such actions by the surgeons do not comport with the reasonable disclosure standards established by G.S. § 90-21.13 (1981).

G

Our decision that health care providers must inform their patients that proposed procedures are experimental accords with the majority of courts and commentators which have considered the problem. One federal court has explicitly established such a rule, that the patient "must always be fully informed of the *experimental nature* of the treatment and of the foreseeable consequences of that treatment." *Ahern v. Veterans Admin.*, 537 F. 2d 1098, 1102 (10th Cir. 1976) (emphasis added). Partially in response to *Ahern*, the Food and Drug Administration has adopted a specific requirement in its informed consent regulations that any procedures which are experimental be disclosed, 46 Fed. Reg. 8,942, 8,944, and 8,951 (1981), as codified at 21 C.F.R. § 50.25(a)(1) (1984). The Supreme Court of Montana has recognized an informed consent cause of action where plaintiff alleged that the

Estrada v. Jaques

procedure was experimental and that the physician did not disclose this, even though plaintiff was fully informed of the nature of the operation itself. *Monroe v. Harper*, 164 Mont. 23, 518 P. 2d 788 (1974). In a Texas case, a directed verdict for a doctor was reversed, since although he showed that his procedure was similar to previous operations, he did not inform the patient that it was the first time he employed a certain type of skin graft. *Wilson v. Scott*, 412 S.W. 2d 299 (Tex. 1967). In *Karp v. Cooley*, 493 F. 2d 408 (5th Cir.), *cert. denied*, 419 U.S. 845, 42 L.Ed. 2d 73, 95 S.Ct. 79 (1974), on the other hand, the court held that since the patient consented to all stages of the operation and there was no showing of concealment of material information, directed verdict for the physician was proper, despite plaintiff's contention that the procedure essentially constituted an experiment. We follow *Ahern* and *Monroe*, however.

In doing so, we also follow the great bulk of the commentators. The underlying tort principles of rationality that require informing before operating clearly demand more information when the proposed procedure is new and untested. *See Comment, Informed Consent as a Theory of Medical Liability*, 1970 Wis. L. Rev. 879, 890 (stricter standard imposed); J. Waltz & T. Scheuneman, *Informed Consent to Therapy*, 64 Nw. U. L. Rev. 628, 640 (1970) (reasonable to require more information for more thorough consideration). Others have recognized that although in some instances the physician may withhold information regarding the experiment, this should only occur in exceptional cases. Note, *Experimentation on Human Beings*, 20 Stan. L. Rev. 99 (1967); G. Annas, *The Law of Informed Consent to Human Experimentation* (1976), *cited in* 46 Fed. Reg. 8,942, 8,943 (1981). The psychology of the doctor-patient relation, and the rewards, financial and professional, attendant upon recognition of experimental success, increase the potential for abuse and strengthen the rationale for uniform disclosure. We have found little authority supporting a contrary rule. Accordingly, we reaffirm our holding that reasonable standards of informed consent to an experimental procedure require disclosure to the patient that the procedure is experimental.

City of Greensboro v. Reserve Insurance Co.

V

The result of our opinion is therefore as follows: That portion of the judgment of 15 June 1983 in favor of the surgeons Miles and Powell which granted them summary judgment on Estrada's negligent performance claims is reversed. That portion of the same judgment striking certain allegations from the amended complaint is affirmed; however, because we have reviewed the underlying summary judgment order on appeal, and found it erroneous, these allegations, of failure of informed consent, are reinstated. As to the informed consent allegations against the radiologists, the appeal must be dismissed.

Affirmed in part; reversed in part; dismissed in part.

Judges WELLS and JOHNSON concur.

THE CITY OF GREENSBORO, A MUNICIPAL CORPORATION; GREENSBORO POLICE DEPARTMENT; E. S. MELVIN, MAYOR OF THE CITY OF GREENSBORO; GREENSBORO CITY COUNCIL AND ITS MEMBERS; V. M. NUSSBAUM, JR., JIMMIE I. BARBER, MARION FOLLIN III, JOHN W. FORBIS, JOANN BOWIE, AND LOIS M. McMANUS; T. Z. OSBORNE, CITY MANAGER OF GREENSBORO; HEWITT E. LOVELACE, JR., PUBLIC SAFETY DIRECTOR FOR THE CITY OF GREENSBORO; AND WILLIAM E. SWING, CHIEF OF THE GREENSBORO POLICE DEPARTMENT v. RESERVE INSURANCE COMPANY; JOHN INGRAM, ANCILLARY RECEIVER OF RESERVE INSURANCE COMPANY; PHILLIP R. O'CONNOR, DOMICILIARY RECEIVER OF RESERVE INSURANCE COMPANY; NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, AND MIDLAND INSURANCE COMPANY

No. 8310SC1112

(Filed 16 October 1984)

1. Insurance § 149— sufficiency of notice—general agent

Notice of claims against city officials delivered to a general agent with the implied actual authority to accept notice is sufficient to impute notice of the city's liability to the insurance company. Furthermore, there was no conflict of interest and the agent was still acting on behalf of the company, when the agent was also the Executive Director of an Insurance Advisory Commission which gave advice and made recommendations to the city on insurance matters, and when the agent received notice of the claim from the city but did not forward it to the company. G.S. 58-39.4(c).

City of Greensboro v. Reserve Insurance Co.

2. Appeal and Error § 42; Insurance § 5— incomplete record

The record did not permit a determination of whether the claims from which the action arose were against public policy and therefore uninsurable because the record did not include the complaint or any pleading from one case, and the complaint in the other case did not reveal whether the plaintiff would proceed on a theory of intentional discrimination or unintentional discrimination based on disparate impact.

3. Insurance § 149— liability insurance distinguished from indemnity insurance

An insurance policy is a policy of liability rather than of indemnity where it provides that the insured parties shall obtain the insurer's consent before incurring any legal fees or settling a claim, and where it also provides that notice of the claim is to be given "as soon as practicable" and that the insurers must pay even when the insured becomes bankrupt or insolvent. G.S. 58-155.48(a)(1).

4. Insurance § 149— other insurance clauses—second policy suspends first

Where one public officials liability policy is taken out while another is still in effect, and both policies contain "other insurance" clauses, the issuance of the second policy violates the other insurance clause of the first, and coverage on the first policy is suspended.

5. Insurance § 149— non-duplication of the coverage—effect of deductible clauses

Where two public officials liability policies provided concurrent coverage, but one carried a deductible of \$1,000 and the other a deductible of \$10,000, there is exclusive coverage under the first policy for liability between \$1,000 and \$10,000, and the non-duplication of coverage statute, G.S. 58-155.52(a), will not prohibit a claim against an insolvent insurer under the first policy for such an amount.

6. Declaratory Judgment § 4.3; Insurance § 92— non-duplication of recovery statute—declaratory judgment not barred

The exhaustion requirement of G.S. 58-155.52(a) does not impose a precondition to a declaratory judgment action to have various rights and liabilities of the involved insurers clarified; furthermore, G.S. 58-155.52(a) does not apply to concurrent coverage where the operation of an "other insurance" clause has suspended coverage on the policy of the insolvent insurer. G.S. 1-253.

7. Insurance § 1; Judgments § 55— prejudgment interest—guaranty association not liable

A guaranty association is not the legal successor of the insolvent insurer; rather, it is obligated to pay claims only to the extent of covered claims, which shall not include any amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises. The North Carolina Insurance Guaranty Association is a statutory creation that does not have liability for prejudgment interest. G.S. 58-155.48(a)(1).

APPEAL by plaintiffs, defendant North Carolina Insurance Guaranty Association, and defendant Midland Insurance Company

City of Greensboro v. Reserve Insurance Co.

from *Bailey, Judge*. Judgment entered 17 May 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 17 September 1984.

Plaintiffs, the City of Greensboro ("the City") and certain of its officials commenced this declaratory judgment action against Reserve Insurance Company ("Reserve") and Midland Insurance Company ("Midland") to construe policies of public officials liability insurance issued to the plaintiffs. The insolvency of Reserve required the substitution of its receivers as the real parties in interest and the addition of the North Carolina Insurance Guaranty Association ("the Association") as an additional party defendant. The Association is an unincorporated legal entity created by the North Carolina Insurance Guaranty Association Act. G.S. 58-155.41, *et seq.*

The facts are not in dispute and may be summarized as follows: The City originally purchased a public officials liability policy from Reserve. The policy period was from 7 October 1974 to 7 October 1977, and the policy had a deductible amount of \$1,000 per loss. In 1976, Reserve gave notice of its intention to cancel the policy effective 1 April 1976. The City thereupon exercised an option it had under the policy to purchase an extension of the insurance, which extension covered claims made against the insured between 1 April 1976 and 1 April 1977, for acts committed before 1 April 1976. Any reference in this opinion to the Reserve policy means the original policy including the extended discovery period.

The City also purchased a public officials liability policy from Midland covering claims made from 1 April 1976 to 1 April 1979. The deductible was \$10,000 per loss. Midland also issued a separate excess liability insurance policy to the City for claims made between 1 July 1976 and 1 April 1979, which policy increased the potential per claim liability of Midland. Any reference herein to the Midland policy means the primary policy; any reference to Midland policies means the primary and the excess policies.

The City purchased the Midland policies through the Guilford City/County Insurance Advisory Committee ("the Committee") a six-member committee of independent insurance agents who gave advice and recommendations to the City and Guilford County with respect to insurance policies, and through whom the City or

City of Greensboro v. Reserve Insurance Co.

County purchased their insurance. The Committee collected commissions on the sale of policies and paid the salaries of its employees, none of whom was an employee of the City, from these commissions. Everette Arnold was Executive Director of the Committee.

Two federal lawsuits brought against the City and its officials underlie this action, as they are the subject of claims made against the Reserve and Midland policies. The first is *Johnsie Washington Wilson, Jr., et al. v. William E. Swing, Chief of Police, Greensboro, et al.* (M.D.N.C. No. C-76-227-G) ("*Wilson*"), filed 13 May 1976, a discrimination suit based on allegations of a city employee's wrongful demotion. Since the action was resolved in favor of the defendants in that case, only legal defense costs resulted. The City submitted an interim statement for legal fees in September 1976, which Reserve paid minus the deductible. The remaining legal costs of \$7,120.16 were paid by the City on 30 October 1979.

The second case is *Brenda J. Bishop, et al. v. City of Greensboro, et al.* (M.D.N.C. C-78-51-G) ("*Bishop*"), which arose from charges of race and sex discrimination against the City and its police department. Before *Bishop* was filed as a lawsuit, a charge of discrimination was sent to the City on 13 July 1976, which charge was immediately forwarded to Everette Arnold, who in turn forwarded a copy to Reserve on 4 August 1976. He did not notify Midland. Attempts to negotiate a resolution of the charge failed, and on 7 February 1978, the plaintiffs in *Bishop* filed their complaint. Again, the City delivered a copy of the complaint to Mr. Arnold who forwarded it to Reserve. On 8 June 1978, Reserve inquired of the City's attorneys about other insurance coverage for *Bishop*, and at their request Mr. Arnold wrote a letter dated 11 July 1978, informing Midland of the *Bishop* suit. Midland ultimately denied any liability on the *Bishop* claim. Plaintiffs then instituted this action for a declaratory judgment on 4 June 1979.

Judge Robert L. Farmer heard the motions of plaintiffs, the Association, and Midland for summary judgment, and entered an order granting partial summary judgment. This order was finalized as an Order Correcting Order entered 11 March 1983 ("*March order*"). On 28 March 1983 the declaratory judgment was heard

City of Greensboro v. Reserve Insurance Co.

by Judge James H. Pou Bailey, which resulted in a judgment entered 17 May 1983 ("May order"). Plaintiffs, defendant Association, and defendant Midland all appeal.

Smith, Moore, Smith, Schell and Hunter, by Martin N. Erwin, and Vance Barron, Jr., for plaintiffs.

Moore, Van Allen and Allen, by Arch T. Allen, III, and Joseph W. Eason, for the North Carolina Insurance Guaranty Association.

Young, Moore, Henderson & Alvis, P.A., by David P. Sousa, and John E. Aldridge, Jr., for Midland Insurance Company.

VAUGHN, Chief Judge.

It is plaintiffs' position on this appeal that both the Association, through the Reserve policy, and Midland, are liable on the *Bishop* claim, and that the Association is liable on the *Wilson* claim. Both Midland and the Association deny all liability on either claim. (At the time of the May order, the *Wilson* case had been settled. The *Bishop* case was still pending; however, the City had already spent over \$50,000 in legal fees defending *Bishop*.)

In the May 1983 order the rights and obligations of the various parties were decreed to be as follows: (1) that the Reserve policy provides coverage for *Bishop* for events occurring before 1 April 1976, and that the Reserve policy covers the costs of defense in *Wilson*, (2) that the Midland policies provide coverage in *Bishop*, (3) that, as to *Bishop*, plaintiffs may proceed against the Association after exhausting their rights under the Midland policies, (4) that the Association is liable as provided by statute for the costs incurred in *Wilson*, (5) that the Association is subrogated to Reserve's receivers for any amounts it pays, and (6) that plaintiffs may recover prejudgment interest from Midland, but not from the Association.

We have organized this opinion by first treating the various defenses raised by the Association and by Midland and then discussing the effect of G.S. 58-155.52, the nonduplication of recovery statute, and finally discussing prejudgment interest.

City of Greensboro v. Reserve Insurance Co.

I

[1] *Midland's late notice defense to the BISHOP claim:* Midland argues that although plaintiffs first received notice of the *Bishop* claim on 13 July 1976, Midland was not notified until it received the 11 July 1978 letter from Everette Arnold, which fell outside the one-year notice period in its policy. The trial court rejected this argument, concluding that Everette Arnold was a general agent of Midland who possessed the express or implied authority to receive notice on behalf of Midland. Therefore, timely notice of *Bishop* sent to Arnold by the City was imputed to Midland. We agree with the trial court.

The evidence shows that in February 1976, Midland requested in writing that Arnold be licensed as its "countersigning agent" in North Carolina. Such a license was issued and kept current. The license, which was signed by Midland's vice-president, specifically designates Arnold a "general agent." Arnold himself testified that he was a general agent for Midland and in that capacity received notice of other claims which he forwarded to Midland. Both the primary and the excess policies issued by Midland are signed by Arnold as "Authorized Representative" of Midland.

We disagree with Midland that this evidence shows that Arnold only possessed the limited authority to countersign policies. We instead conclude that Arnold was appointed a general agent by Midland, and as a general agent, he possessed the implied actual authority to accept notice. See G.S. 58-39.4(c) (defining general agent); *Morpul Research Corp. v. Westover Hardware, Inc.*, 263 N.C. 718, 721, 140 S.E. 2d 416, 418 (1965) (agent has implied authority to do things usual and necessary in carrying out his or her duties). The evidence is undisputed that Arnold, the general agent, was notified of the *Bishop* claim and complaint "as soon as practicable," within the meaning of the policy. Such knowledge is imputed to Midland, Arnold's principal. *Ward v. Thompson Heights Swimming Club, Inc.*, 27 N.C. App. 218, 220, 219 S.E. 2d 73, 75 (1975).

Midland further contends that even if Arnold were Midland's agent, he was a dual agent representing two principals, Midland and the Committee, and since notice of the *Bishop* claim was acquired while exclusively representing the interests of the Com-

City of Greensboro v. Reserve Insurance Co.

mittee, such knowledge cannot be chargeable to Midland. See *McCartha v. Ice Co.*, 220 N.C. 367, 17 S.E. 2d 479 (1941). This contention has no merit. Arnold testified he routinely forwarded notice of claims against Midland that he received to that insurer while serving on the Committee.

Midland further argues that in electing not to forward notice to Midland in this instance, Arnold was acting for his and for the City's interests, interests that were adverse to Midland's and because he was pursuing adverse interests, the general rule imputing the agent's knowledge to the principal does not apply. See *Sparks v. Trust Company*, 256 N.C. 478, 124 S.E. 2d 365 (1962). We fail to see how the City's interests and Midland's were in any sense adverse. To have forwarded notice of the claim to Midland would have preserved the City's rights against Midland as well as against Reserve. Arnold's duty to Midland did not therefore conflict with his duty to the insured since both duties were congruent in requiring Arnold to forward notice to the company.

[2] *The Association's public policy defense to the WILSON and BISHOP claims:* The Association maintains that the *Wilson* and *Bishop* claims are uninsurable, asserting that insurance against intentional acts of a discriminatory or unconstitutional nature is against public policy, and such insurance is therefore void. Although any contract of insurance contrary to public policy is invalid and unenforceable, e.g., *Electrova Co. v. Spring Garden Insurance Co.*, 156 N.C. 232, 72 S.E. 306 (1911), we do not reach the merits of this issue. Although we do not believe these claims are uninsurable, it is impossible to determine from the record whether the *Wilson* claim and the *Bishop* claim are founded on acts of a discriminatory or unconstitutional nature. Nowhere in the record does the complaint or any pleading from the *Wilson* case appear. The *Bishop* claim is still pending, and we cannot discern from the attached complaint whether the plaintiffs in *Bishop* will elect to proceed exclusively on a theory of intentional discrimination, i.e., disparate treatment, as opposed to a theory of unintentional discrimination based on disparate impact. See *Solo Cup Co. v. Federal Insurance Co.*, 619 F. 2d 1178 (7th Cir.), cert. denied, 449 U.S. 1033, 101 S.Ct. 608, 66 L.Ed. 2d 495 (1980).

[3] *The Association's indemnity policy defense to the WILSON and BISHOP claims:* The Association also contends that the plain-

City of Greensboro v. Reserve Insurance Co.

tiffs' claim is not a "covered claim" for which it is obligated because it did not arise within thirty days of the determination of Reserve's insolvency. G.S. 58-155.48(a)(1). The Association alleges that the trial court incorrectly determined that the Reserve policy was an indemnity policy, rather than a liability policy, and the result of this incorrect determination was a conclusion that the Association was liable on both claims pursuant to G.S. 58-155.48(a)(1).

The evidence shows that Reserve was declared insolvent on 29 May 1979. The City paid the balance of the *Wilson* claim in excess of the deductible on 30 October 1979, and on 17 May 1983, the date of Judge Bailey's order, the *Bishop* lawsuit was still pending. The Association argues that because the Reserve policy was an indemnity policy, no claim against Reserve based on either *Bishop* or *Wilson* arose within thirty days of Reserve's insolvency. Plaintiffs contend that the Reserve policy was not an indemnity policy, but a liability policy, and that liability attached as to Reserve on 13 July 1976, the date on which the *Bishop* claim was made, and on 13 May 1976, the date on which the *Wilson* suit was filed. Plaintiffs conclude that since the liability of Reserve as to both claims attached prior to insolvency, both *Wilson* and *Bishop* are "covered claims existing prior to the determination of insolvency," G.S. 58-155.48(a)(1), and that the Association is therefore obligated on them. We agree with plaintiffs.

The fundamental distinction between a policy of indemnity insurance and one of liability involves when the obligation of the insurer to the insured first attaches:

The general distinction between the two kinds of insurance is that if the policy is one against liability, the coverage thereunder attaches when the liability attaches, regardless of actual loss at that time; but if the policy is one of indemnity only, an action against the insurer does not lie until an actual loss in the discharge of the liability is sustained by the insured. . . .

43 Am. Jur. 2d, Insurance, § 12, pp. 770-1 (1982). *Accord*, 6B J. Appleman, *Insurance Law and Practice* § 4261 (Rev. ed. 1979).

The determination of whether a particular policy of insurance is one of indemnity or liability "depends upon the intention of the

City of Greensboro v. Reserve Insurance Co.

parties as evinced by the phraseology of the agreement in the policy." *Boney v. Central Mutual Insurance Company of Chicago*, 213 N.C. 470, 473, 196 S.E. 837, 839 (1938). The *Boney* case identifies some of the factors to be considered in making this determination:

"Where the policy provides that insured shall immediately notify the company in case of accident or injury, that the company would defend actions growing out of injuries, in the name of insured, and that insured should not settle any claim or incur any expense without the consent of the company, it is generally held to be a policy of indemnity against liability for damages, and is not merely a contract of indemnity against damages."

213 N.C. at 473, 196 S.E. at 839 (quoting *Corpus Juris*).

The insuring clause of Reserve's policy provides that if a claim or claims is made against the insured during the policy period, "the Insurer will indemnify . . . the Insureds . . . for all loss which the said Insureds . . . shall become legally obligated to pay." We note that Reserve's insuring clause is nearly identical to Midland's, whose policy the Association concedes is one of liability insurance. What distinguishes the two policies are their respective provisions relating to the insurer's obligation to defend claims against the insured. While the Midland policy imposes a "right and duty" to defend any suit against an insured, which typically indicates a liability policy, see *Boney, supra*, Reserve's policy contains the following clause:

The Insureds shall select and retain legal counsel to represent them in the defense and appeal of any claim, suit, action or proceeding covered under this policy, but no fees, costs or expenses shall be incurred or settlements made, without the Insurer's consent, such consent not to be unreasonably withheld.

The Association stresses that this clause does not impose upon the insurer an absolute duty to defend actions against its insured, on the theory such duty is a prerequisite to a policy of liability insurance. However, we feel that requiring Reserve's consent before an insured incurs any legal fees or settles a claim is sufficient participation by that insurer in defense of claims against its insured for the clause to be a factor in favor of liability

City of Greensboro v. Reserve Insurance Co.

insurance. See *Boney, supra*. We have no doubt that if an insured had failed to secure Reserve's consent to defense of a claim against it, that Reserve would have raised such failure as a defense against its own liability. Furthermore, the policy contains other indicia that the policy was intended to be one of liability insurance. See *Blake v. St. Paul Fire and Marine Ins. Co.*, 38 N.C. App. 555, 248 S.E. 2d 388 (1978) (construe policy as whole). Notice of a claim against an insured is to be given to Reserve "as soon as practicable." Reserve is also obligated to pay the liability of the insured even when the insured becomes insolvent or bankrupt and therefore unable to pay.

[4] *The Association's and Midland's "other insurance" clause defense to the BISHOP claim:* Both the Association and Midland deny any liability on the *Bishop* claim by relying on the "other insurance" clauses in their respective policies. They both assign error to the following conclusion of law in the March order:

The "other insurance" clauses in the Reserve and Midland policies, which purport to exclude liability if there is a claim "which is insured by another valid policy or policies" are mutually conflicting and should be disregarded.

We agree with the Association and with Midland that the "other insurance" clauses, also known as "escape" or "no liability" clauses, *Horace Mann Ins. Co. v. Continental Casualty Co.*, 54 N.C. App. 551, 553, n. 2, 284 S.E. 2d 211, 212 (1981), are at issue here because these policies provide overlapping or concurrent coverage for the *Bishop* claim. (We note, however, the two policies are not completely concurrent. See discussion *infra*.) While both Midland and the Association would have us enforce their respective escape clauses, arguing that North Carolina has rejected the doctrine of mutual repugnancy relied upon by the trial court, the plaintiffs maintain that neither provision is effective.

We find that defendant-appellants have correctly stated the law. Our courts have in fact rejected the doctrine of mutual repugnancy where two escape clauses conflict. In *Sugg v. Ins. Co.*, 98 N.C. 143, 3 S.E. 732 (1887), after taking out an initial policy of fire insurance, plaintiff-insured took out additional policies on the same property, forgetting that it was already insured. All of the policies contained escape clauses. Our Supreme Court held that the taking out of each subsequent policy violated the clause in the

City of Greensboro v. Reserve Insurance Co.

original policy prohibiting other insurance, and thus plaintiff could not recover against defendant, the original insurer. *Sugg* was expressly relied on in *Allstate Ins. Co. v. Integon Indemnity Corp.*, 24 N.C. App. 538, 211 S.E. 2d 463 (1975), which case also involved two policies of fire insurance both containing escape clauses taken out by the same policyholder. Although conceding that the doctrine of mutual repugnancy "is not without a sound basis in reason," *id.* at 541, 211 S.E. 2d at 466, this Court stated it was bound by the *Sugg* decision and held that the liability of Integon, the original insurer, was precluded by the existence of the policy subsequently taken out from Allstate. Similarly, in the case of *N. C. Grange Mutual Ins. Co. v. Johnson*, 51 N.C. App. 447, 276 S.E. 2d 469 (1981), this Court held that where the insured had a second hail insurance policy written on his crop, "the coverage on the first policy would be suspended." 51 N.C. App. at 449, 276 S.E. 2d at 470. We note, however, that *Grange* makes no mention of either the *Sugg* or *Integon* decisions, and furthermore, that the single case relied on in *Grange* did not involve a head-on conflict of two "other insurance" clauses.

In the case *sub judice*, Midland's policy was taken out by the City while Reserve's policy was still in effect. Both policies contained "other insurance" clauses. When the Midland policy was issued, the "other insurance" clause in the Reserve policy was violated, and coverage on that policy suspended. We therefore hold that insofar as there was concurrent coverage under the two policies, Midland will be liable on the *Bishop* claim, and the Association will not be liable.

We are cognizant that in rejecting the doctrine of mutual repugnancy in these circumstances, we are at variance with the majority viewpoint, which resolves the issue of liability in these cases by declaring the escape clauses mutually repugnant and prorating the loss between the insurers. See 16 *Couch on Insurance* 2d (Rev. ed. 1983) § 62:85, and cases therein cited at n. 19; 8A J. Appleman, *Insurance Law and Practice* § 4910 (Rev. ed. 1981), and cases therein cited at n. 21. Particularly well-written opinions adopting the majority position are found in *State Farm M.A. Ins. Co. v. Employers Com'l U. Ins. Co.*, 35 Colo. App. 406, 535 P. 2d 266 (1975) and *Travelers Indemnity Company v. Chappell*, 246 So. 2d 498 (Miss. 1971). We are also aware that the North Carolina rule seems largely based on a single case decided nearly

City of Greensboro v. Reserve Insurance Co.

a century ago, *Sugg v. Ins. Co.*, discussed *supra*. We are nonetheless constrained to apply the law as it exists.

II

[5] Based on the finding in the March order that the two "other insurance" clauses should be disregarded, in its May order the trial court ruled, *inter alia*, that Midland is liable to the City for the *Bishop* claim, and that after the City exhausts its rights under the Midland policies, the Association is liable to the City on *Bishop* to the extent Reserve's obligation on that claim exceeds \$100 and is less than \$300,000, the statutorily prescribed limits of G.S. 58-155.48(a)(1). The court further ruled that any amount payable to the Association shall be reduced by the amount of any recovery from Midland. Put otherwise, the trial court made Midland primarily liable and the Association secondarily liable for the *Bishop* claim by relying on G.S. 58-155.52(a), which governs non-duplication of recovery, and reads:

Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his rights under such policy. Any amount payable on a covered claim under this Article shall be reduced by the amount of any recovery under such insurance policy.

Plaintiffs argue that because this statute applies only to claims that are concurrently covered by both a policy of an insolvent insurer and a policy of a solvent insurer, the trial court failed to make a crucial distinction between the portion of the *Bishop* claim for which the Reserve policy provides exclusive coverage, and that portion which is concurrently covered by the Reserve and the Midland policies. We agree. Both policies cover wrongful acts committed prior to 1 April 1976; only Midland covers acts occurring after 1 April 1976. So there appears to be concurrent coverage by Midland and Reserve *before* 1 April 1976, and exclusive coverage by Midland *after* 1 April 1976. This conclusion, however, ignores the difference between deductibles in the two policies. Because the deductible in the Reserve policy is \$1,000, and that in the Midland policy is \$10,000, as to the City's liability for wrongful acts of its public officials before 1 April 1976, Midland is not liable until the City's liability has exceeded

City of Greensboro v. Reserve Insurance Co.

\$10,000. Therefore, there is exclusive coverage under the Reserve policy for acts committed before 1 April 1976 where the City's liability is between \$1,000 and \$10,000. We hold that the trial court erred in not allowing plaintiffs to proceed directly against the Association on the *Bishop* claim for those amounts.

[6] We now turn to the question of liability on that portion of the *Bishop* claim which is covered concurrently by the Reserve and Midland policies, namely, for wrongful acts occurring before 1 April 1976 for which the liability of the City is greater than \$10,000. As to the concurrent coverage, the trial court ruled in its May order that the exhaustion and offset requirements of G.S. 58-155.52(a) require the City to first exhaust its rights under the Midland policy before proceeding against the Association. This interpretation, however, was based on the incorrect finding in the March order that the two escape clauses were mutually repugnant and to be disregarded. Because our resolution of that issue makes Midland alone liable for that portion of the *Bishop* claim concurrently covered by the Reserve and Midland policies, there is no need to apply G.S. 58-155.52(a) to this case. Therefore, although the trial court correctly concluded that Midland is fully obligated to the City under its policies, since the taking out of the Midland policies violated the "other insurance" clause in the Reserve policy, suspending coverage on the Reserve policy, it was error to conclude that the Association has any liability to the City on the *Bishop* claim insofar as there was concurrent coverage under the Reserve and Midland policies. Our holding on this point obviates any need to discuss the consequences of the varying maximum limits of coverage contained in the policies.

We also reject the Association's contention that that portion of the plaintiffs' action against the Association relating to the *Bishop* claim should have been dismissed on the ground that the exhaustion requirement of G.S. 58-155.52(a) imposes a precondition to suit as well as a precondition to recovery. The Association is a proper party to this action. North Carolina's Declaratory Judgment Act expressly confers on courts the "power to declare rights, status, and other legal relations," G.S. 1-253, as long as there exists an actual controversy between the parties. *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949). Plaintiffs brought this declaratory judgment action to have various rights and liabilities of the involved insurers clarified, which is entirely permissible

City of Greensboro v. Reserve Insurance Co.

under the Act. Furthermore, we note the Association consented to joinder as a party defendant.

III

[7] The trial court decreed in its May order that the plaintiffs were entitled to recover prejudgment interest from Midland "at the legal rate for all amounts previously becoming due and owing" under that judgment, but that prejudgment interest was not recoverable from the Association. Plaintiffs excepted to this portion of the judgment, asserting that prejudgment interest should accrue on their claims against the Association from 4 October 1979, the date on which the plaintiffs' motion to add the Association as a party to the present action was served on them.

Although North Carolina allows prejudgment interest to be awarded in a breach of contract action, *see, e.g., Lazenby v. Godwin*, 60 N.C. App. 504, 299 S.E. 2d 288 (1983), whether prejudgment interest may be assessed against an insurance guaranty association where the insolvent insurer might have been liable for it is a question not yet encountered by our courts. The Association argues that this is not technically a breach of contract action, *viz.*, that any liability it has arises from statute, and not from the insurance contract between plaintiffs and Reserve. We agree with the Association that it is the identity of the Association as a statutory creation that relieves it from liability for prejudgment interest. As the Superior Court of Pennsylvania reasoned in a 1980 case, interpreting statutes similar to North Carolina's, a guaranty association is not the legal successor of the insolvent insurer; rather, it is obligated to pay claims only to the extent of covered claims, which shall not include any amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises. *Sands v. Pa. Ins. Guaranty Ass'n.*, 283 Pa. Super. 217, 228, 423 A. 2d 1224, 1229 (1980). *See G.S. 58-155.48(a) (1)*. We therefore affirm that portion of the May order which disallowed the recovery of prejudgment interest from the Association.

IV

We summarize the effect of our decision on the liabilities of the insurers to the plaintiffs:

Hinton v. Hinton

(1) As to the *Wilson* claim, the Association is liable through the Reserve policy.

(2) As to the *Bishop* claim, the Association is liable through the Reserve policy for that portion of the claim based upon wrongful acts committed before 1 April 1976 where the liability is between \$1,000 and \$10,000, while

(3) Midland is liable on its policies for that portion of the claim based on wrongful acts committed before 1 April 1976 where the liability is greater than \$10,000, and

(4) Midland is also liable on its policies for that portion of the claim based on wrongful acts committed after 1 April 1976.

(5) Midland is liable for prejudgment interest for amounts previously due and owing the plaintiffs; the Association is not liable for prejudgment interest.

Affirmed in part, reversed in part.

Judge WHICHARD concurs.

Judge JOHNSON concurs in the result.

JOHNNIE HINTON, JR. v. MARGIE C. HINTON

No. 8310DC1222

(Filed 16 October 1984)

1. Divorce and Alimony § 30— equitable distribution of marital property—marital misconduct not factor

Marital misconduct or fault is not a proper factor to be considered under the catch-all provision of G.S. 50-20(c)(12) in determining what constitutes an equitable distribution of marital property.

2. Divorce and Alimony § 30— equitable distribution of marital property—evidence of physical abuse

In a proceeding to determine the equitable distribution of marital property, the trial court erred in admitting and considering evidence that plaintiff husband physically abused his wife throughout the course of the marriage, and the court erred in concluding that the wife was entitled to a greater share of

Hinton v. Hinton

the property than the husband based in part upon a determination that injuries from beatings received by defendant have affected her employability.

3. Pleadings § 37.1— admission of allegations—proof not necessary

Where plaintiffs reply admitted the allegations of defendant's counterclaim that a certain house was marital property, the reply constituted a judicial admission that the house was marital property and conclusively established that fact for the purposes of the case.

Judge BECTON dissenting.

APPEAL by plaintiff from *Creech, Judge*. Judgment entered 7 September 1983 in District Court, WAKE County. Heard in the Court of Appeals 31 August 1984.

DeMent, Askew and Gaskins by Johnny S. Gaskins for plaintiff appellant.

Edelstein, Payne and Jordan by Thomas W. Jordan, Jr., for defendant appellee.

BRASWELL, Judge.

When plaintiff-husband filed an action for divorce based on one year's separation, defendant-wife filed a counterclaim asking for an equitable distribution of the marital property pursuant to G.S. 50-20. In his reply to the counterclaim the husband joined in the wife's prayer for relief of equitable distribution. The divorce action was filed 2 November 1982. An absolute divorce was granted on 26 January 1983. The judgment for equitable distribution was filed 14 September 1983.

In the separate hearing on the matter of equitable distribution of the marital property the trial court admitted evidence, over the husband's objection, showing that the husband had physically abused the wife during the course of their marriage. The court, relying in part on the evidence of husband's abuse of wife, concluded that an equal division of the marital property would not be equitable and awarded defendant-wife a greater share of the property. From the judgment entered, the husband appealed.

[1] The primary issue presented by this appeal is whether marital misconduct, or fault, is a proper factor to be considered in determining what constitutes an equitable distribution of marital

Hinton v. Hinton

property. When we refer to fault, or marital misconduct, we mean conduct that undermines the marital relationship, such as cruelty, abandonment, adultery, or indignities. We believe fault is not a relevant consideration in distributing marital property.

G.S. 50-20(c) provides that a court in determining an equitable distribution of marital property must consider the eleven specific factors enumerated therein. In addition, the court is directed to consider as a twelfth factor "[a]ny other factor which the court finds to be just and proper." G.S. 50-20(c)(12). Fault is neither expressly included nor excluded from the list of appropriate factors. The statute leaves unanswered the question whether fault may be considered under the twelfth factor, which is commonly referred to as the catch-all provision.

There is little uniformity among states with equitable distribution statutes as to whether fault should be considered in distributing marital property. A number of states by statute exclude marital misconduct or fault as a consideration in equitable distribution proceedings, *see, e.g.*, Del. Code Ann. tit. 13, Sec. 1513(a) (1981); Ill. Ann. Stat. Ch. 40, Sec. 503(d) (Smith-Hurd 1984); Minn. Stat. Ann. Sec. 518.58 (West 1984), while in other states, courts are required to consider fault in making an equitable distribution. *See, e.g.*, Conn. Gen. Stat. Ann. Sec. 46b-81(c) (West 1984); Mass. Gen. Laws Ann. Ch. 208, Sec. 34 (West 1984); Mo. Ann. Stat. Sec. 452.330.1(4) (Vernon 1984). In at least two states consideration of fault is discretionary with the trial courts. *See* Ala. Code Sec. 30-2-52 (1983); Vt. Stat. Ann. tit. 15, Sec. 751 (Equity 1984).

Even in those states which have an equitable distribution statute containing a catch-all provision similar or analogous to the one contained in N.C.G.S. 50-20(c)(12), their courts have been unable to agree on this issue. *See Blickstein v. Blickstein*, 99 A.D. 2d 287, 472 N.Y.S. 2d 110 (1984); *In re Marriage of Williams*, 199 N.W. 2d 339 (Iowa 1972); *Chalmers v. Chalmers*, 65 N.J. 186, 320 A. 2d 478 (1974) (fault not relevant consideration). *But see LaRue v. LaRue*, 216 Kan. 242, 531 P. 2d 84 (1975); *Hultberg v. Hultberg*, 259 N.W. 2d 41 (N.D. 1977) (fault should be considered). As an illustration, we refer to *Blickstein, supra*, where the issue before the court was whether marital fault was a relevant consideration under the catch-all provision of New York's equitable distribution

Hinton v. Hinton

statute, N.Y. Domestic Relations Law Sec. 236, part B, subd. 5, par. d, cl. [10], which is remarkably similar to the catch-all provision in our statute. It provides that in addition to the nine listed statutory factors which the New York court must consider the court may consider "any other factor which the court shall expressly find to be just and proper." The court concluded that as a general rule, the marital fault of a party is not a relevant consideration in determining an equitable distribution, reasoning as follows:

It has been repeatedly emphasized that the marriage relationship is to be viewed as, among other things, an economic partnership and that upon dissolution the accumulated property should be distributed on the basis of the economic needs and circumstances of the case and of the parties It would be, in our view, inconsistent with this purpose to hold that marital fault should be considered in property distribution. Indeed, it would introduce considerations that are irrelevant to the basic assumptions underlying the equitable distribution law, i.e., that each partner has made a contribution to the marital partnership and that upon its dissolution each is entitled to his or her fair share of the marital estate Moreover, fault is very difficult to evaluate in the context of a marriage and may, in the last analysis, be traceable to the conduct of both parties. (Citations omitted.)

Id. at 291-92, 472 N.Y.S. 2d at 113.

We have carefully considered the arguments on both sides of this issue and recognize that strong arguments can be made both for and against the consideration of fault in equitable distribution proceedings. However, we are persuaded that the position most consistent with the policy and purpose of North Carolina's equitable distribution statutes is the position taken by the New York court in *Blickstein*—that fault is not a relevant or appropriate consideration in determining an equitable distribution of marital property.

Our equitable distribution statute, G.S. 50-20, was enacted in recognition of marriage as a partnership, economic and otherwise, to which both parties contribute either directly or indirectly. By enacting G.S. 50-20, our Legislature granted courts the power to

Hinton v. Hinton

consider factors other than legal title in distributing the marital assets upon the dissolution of the marriage thereby permitting courts to make an equitable distribution which effects a return to each party of that which he or she contributed to the marriage. As we interpret it, the policy behind G.S. 50-20 is basically one of repayment of contribution. We believe it would be inconsistent with this policy to hold that courts may consider fault in making such distributions.

In *Chalmers v. Chalmers*, 65 N.J. 186, 194, 320 A. 2d 478, 483 (1974), the Supreme Court of New Jersey reached the same conclusion in interpreting its property distribution statute based on the following reasoning:

[T]he statutory provision for equitable distribution of property is merely the recognition that each spouse contributes something to the establishment of the marital estate even though one or the other may actually acquire the property. Therefore, when the parties become divorced, each spouse should receive his or her fair share of what has been accumulated during the marriage. The concept of fault is not relevant to such distribution since all that is being effected is the allocation to each party of what really belongs to him or her.

A second reason given by the court in *Chalmers* in support of its holding that fault should be excluded as a consideration in equitable distribution proceedings was that marriage is such an intricate relationship that it is often very difficult, if not impossible, to determine who is really at fault in the breakup of a marriage. *Id.* at 193, 320 A. 2d at 482. We agree. We further believe that it was not the intent of our Legislature by its inclusion of the catch-all provision, G.S. 50-20(c)(12), to give courts the inherently arbitrary power to place a monetary value on the misconduct of a spouse in dividing property. Placing such a value on fault is what must necessarily occur if fault is to be considered in determining an equitable division of property. In our opinion the only justification for allowing courts to consider fault in dividing marital property is to permit them to use their power to punish the "guilty" spouse. We cannot believe this is what our Legislature intended. The statute must not be considered a penalty statute. As said in Note, The Discretionary Factor in the Equitable Distribution Act,

Hinton v. Hinton

60 N.C.L. Rev. 1399, 1405 (1982), "‘fault may be merely the manifestation of a sick marriage.’ (Citation omitted)."

One final reason for excluding fault as a consideration in equitable distribution proceedings is the fact that the Legislature has abolished fault-based divorces and established the "no fault" absolute divorce, G.S. 50-6, based on one year's separation. More importantly, the Legislature has demonstrated through G.S. 50-16.2 and G.S. 50-16.5(b) that the appropriate forum for the consideration of fault in divorce proceedings is in the determination and award of alimony. See *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). G.S. 50-16.2 requires that the dependent spouse first establish a fault ground in order to be entitled to an award of alimony. Furthermore, according to G.S. 50-16.5(b), the fault of the dependent spouse may be used in determining the actual amount of alimony given to the dependent spouse. It is clear that the Legislature intended fault to be a consideration in awarding alimony. No such intent is evident from G.S. 50-20 nor is fault appropriate in determining what is an equitable settlement and division of property between the parties.

[2] In the present case, the plaintiff-husband contends the court's admission and consideration of evidence showing that he physically abused his wife throughout the course of the marriage constituted prejudicial error. We agree. We believe it is clear from the judgment entered, and neither party argues otherwise, that the court both considered and relied upon evidence of fault in determining the distribution of the marital property.

In the judgment, the court made several findings of fact which relate solely to the husband's abuse of his wife which may be summarized as follows: that throughout their marriage, the husband was argumentative with his wife, threatened her verbally, and assaulted her physically; that in 1972, the husband chased his wife around their house with a loaded shotgun and told her he was going to blow her head off; that in 1980, the husband pointed a loaded shotgun within inches of his wife's head and told her to "say your prayers because it will be the last time you see daylight," and kept the gun pointed at her head for at least thirty minutes; that in 1976, the husband beat his wife with his shoe; that in 1981, while the wife was talking on the phone, the husband ripped the phone off the wall and chased his wife with a

Hinton v. Hinton

butcher knife; that on another occasion, the husband beat both his wife and one of their daughters; that in addition to the above instances, the husband struck his wife approximately once to twice monthly for the last two or three years preceding their separation; that all of the above-mentioned incidents occurred without provocation by the wife; and that the husband admits striking his wife on two occasions including one time when he spanked her over his knee when she was thirty-five years old.

The court also found that in 1975, the husband contracted venereal disease and gave it to his wife; that in an argument over this the husband struck his wife in her face with his fists causing a detached retina and some scarring of the eye tissue in her left eye; that the wife still suffers from the injury and it affects her ability to work; and that at least in part, the gross disparities in the parties' incomes is due to the wife's eye injury caused by the husband's beating. Such evidence unquestionably constitutes evidence of fault and was improperly considered by the court.

Based on such findings, the court made several conclusions of law including the following:

5. An equal division of the marital property was not equitable due to the disparity in income of the parties, injuries from the beatings received by Defendant which have affected her employability, the duration of the marriage, the disparity between the retirement rights of the parties, and the indirect contribution of the Defendant to help in the career potential of the Plaintiff.

In addition, the court stated twice under its findings of fact that it found an equal division of the marital property would not be equitable. In one of these findings, the court indicated it based its finding on the factors listed in Conclusion Number 5 with the exception of "injuries from the beatings received by Defendant which have affected her employability" which was omitted. In the other finding, the court did not state any factors or evidence as the basis for its finding.

Thus, it is not entirely clear what evidence the court felt was determinative in reaching its conclusion that an equal division was not equitable. However, in Conclusion Number 5 the court indicated it based its conclusion in part on "injuries from the

Hinton v. Hinton

beatings received by Defendant which have affected her employability," which we believe reflects the court's consideration of evidence showing the husband beat his wife and reflects the court's apparent belief that because it is the husband's fault that his wife's future earning ability is limited, his share of the marital property should be reduced. In light of this part of Conclusion Number 5 and the extensive findings made by the court with respect to the fault evidence, we believe it is clear the court improperly relied upon the evidence of fault in determining the distribution of the marital property. In so doing, the court committed prejudicial error which requires that the judgment be vacated and the cause remanded for a new hearing. We note that on remand the court may possibly again conclude that an equal division is not equitable and order the same or similar distribution as originally ordered; but if the court does so, it must support its conclusion and distribution with adequate findings based on proper evidence and statutory factors and not on evidence of the fault of the parties.

[3] Plaintiff-husband also assigns as error on appeal the court's classification of the parties' marital home, located at 861 Newcombe Road in Raleigh, as marital property. We find this argument meritless. In paragraph fifteen of her answer and counterclaim, defendant-wife alleged as follows:

15. Throughout the marriage of the parties, Plaintiff and Defendant acquired certain property that is marital property, including but not limited to the following: (a) a house located at 861 Newcomb [*sic*] Road, Raleigh, North Carolina

In his reply, plaintiff admitted the allegations of this paragraph of the counterclaim thereby admitting that the house in question was marital property.

It has long been established that where there is an admission in the final pleadings defining the issues and on which the case goes to trial, such admission is a judicial admission which conclusively establishes the fact for the purposes of that case and eliminates it entirely from the issues to be tried. *See* 2 Brandis on North Carolina Evidence Sec. 177 (2d ed. 1982); *Watson v. White*, 309 N.C. 498, 509, 308 S.E. 2d 268, 275 (1983). Since plaintiff's reply was not amended, it constituted a judicial admission that the house was marital property, thus conclusively establishing that

Hinton v. Hinton

fact for purposes of this case. On remand the husband will not be allowed to offer evidence, as set out in the brief, to show that the house was purchased on 16 December 1963 and titled in plaintiff's and defendant's names, and that they were not married until 2 May 1964.

The judgment is vacated and the case is remanded for a new hearing on the equitable distribution of the marital property. Because there was no error in the determination of what was marital property, the focus of the new hearing must be upon what division constitutes an equitable distribution.

Vacated and remanded.

Judge HILL concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Although I agree with the majority that fault in the abstract should not be considered in equitably distributing marital property, I discern a legislative intent, as expressed in N.C.G.S. 50-20(c)(1), (3) and (7) (Supp. 1983), to consider the parties' relative economic positions, to consider the physical and mental health of the parties, and to consider one spouse's contributions to develop the career potential of the other spouse in an equitable distribution. Therefore, and by way of example, if the trial court can consider one spouse's effort in developing the career potential of the other spouse, the trial court ought to also be allowed to consider one spouse's efforts to *diminish* the career potential of the other spouse. In this case, the trial court did not rely on any of its numerous findings concerning "fault" to support the unequal distribution it made. Rather the trial court concluded that the husband's beatings resulted in injuries which diminished the wife's employability. Believing that the trial court fulfilled the legislative intent, and did not rely on "fault," I dissent.

State v. Rutherford

STATE OF NORTH CAROLINA v. KYLE EDWARD RUTHERFORD AND RICKY THOMAS FAUST

No. 8412SC79

(Filed 16 October 1984)

1. Criminal Law § 101— conversation between juror and witness—mistrial not required

Where a juror and a witness for the State discussed whether they had mutual acquaintances during a lunch recess, the court did not abuse its discretion by denying defendants' motion for a mistrial where the court conducted a *voir dire* after the jury verdict was returned, made a full inquiry into the facts and circumstances surrounding the conversation and whether the defendants had suffered prejudice by it, and gave defendants a full opportunity to ask questions concerning the contents of the conversation and its effect on the juror. G.S. 15A-1061.

2. Robbery § 4.3— armed robbery—evidence sufficient—incriminating statements not hearsay

The evidence was sufficient to support one defendant's conviction of armed robbery where there was evidence that such defendant had made threats which helped control the victim's movements, and that such defendant had participated in a conversation in which incriminating statements had been made, even though the witness could not remember specifically what each defendant had said.

3. Criminal Law § 86.8— impeachment of State's witness—plea bargain

There was no error in refusing to allow a State's witness to answer a question about the amount of time he would actually serve when the jury had been informed that the witness testified in return for the State accepting his guilty plea to a reduced offense and a set maximum sentence of eight years. The amount of time he would actually serve was speculative. G.S. 15A-1052(c).

APPEAL by defendants from *Bowen, Judge*. Judgment entered 29 August 1983, in Superior Court, CUMBERLAND County. Heard in the Court of Appeals on 26 September 1984.

Attorney General Rufus L. Edmisten by Assistant Attorney General Guy A. Hamlin for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Robin E. Hudson for defendant appellant, Kyle Edward Rutherford.

Harris, Sweeny & Mitchell by Ronnie M. Mitchell for defendant appellant, Ricky Thomas Faust.

State v. Rutherford

BRASWELL, Judge.

While hitchhiking, Harold Wayne Zortman, a Fort Bragg soldier, was robbed at gunpoint. The defendants were tried and convicted by a jury of Robbery with a Firearm. An assignment of error common to both defendants' briefs concerns whether the trial court abused its discretion by failing to declare a mistrial on the grounds that the jury was improperly influenced by contact with a State's witness. Defendant Rutherford additionally assigns as error the entry of his conviction judgment when crucial evidence admitted against him constituted hearsay. Defendant Faust also contends that the trial court erred by limiting his scope of cross-examination for impeachment purposes as to a witness's bias or prejudice.

At trial Harold Zortman testified that at about 10:00 p.m. on 15 January 1983 he was hitchhiking to Fayetteville to attend a friend's party when three white men in a car stopped and asked him if he wanted a ride. He climbed in the car and was then driven to a wooded area where he was ordered by the men to remove his wallet, its contents of approximately eighty-three dollars, his belt, his knife, and his jacket. The man sitting in the front passenger's seat had a shotgun. After handing over the items, the robbers told Zortman to start walking back down the road and not to look back. The robbers drove away. On cross-examination, the defendants elicited evidence from Zortman tending to show that the descriptions he gave to the police did not match the physical characteristics of the defendants and that he was unable to positively identify the defendants through photographs as the robbers.

Pursuant to a plea agreement, Vincent Gorneault pled guilty to common law robbery for his participation in the crime and testified for the State identifying the defendants as the other two robbers. He further testified that he had been present for the planning of the crime, owned the shotgun used by Faust in the robbery, and had driven the vehicle.

Further evidence offered identifying the defendants as participants in the crime was the testimony of Burton Keeler who saw the men after the robbery and heard them discuss "what they did and how they did it."

State v. Rutherford

The defendants countered the State's case by offering evidence supporting alibi defenses.

On 24 August 1983 after closing arguments had been made, but before the trial judge had charged the jury, the victim, Harold W. Zortman, had a conversation with a juror, Robert Foggy, Jr., during a lunch recess. While standing next to each other in the line to order food from the snack bar in the basement of the courthouse, Zortman asked Foggy if he had understood him correctly in the hearing that he was retired from the artillery division in the military. They then discussed for three minutes or so whether they knew some of the same people in that division.

This contact between the victim and the juror was made known to the prosecutor and then to the trial judge, but defense counsels were not informed of the conversation until a verdict had been reached. After the jury was dismissed, the trial judge immediately conducted a *voir dire* hearing to inquire into the circumstances surrounding the conversation. Both Zortman and Foggy were examined and cross-examined under oath. Each man testified that their conversation did not concern the criminal lawsuit being tried nor did they discuss anything related to Foggy's jury service. Following this *voir dire*, the trial court, in denying the defendants' motion for a mistrial, determined that because the conversation had no effect upon the verdict, the defendants had not been prejudiced.

[1] The defendants argue that the trial court erred in denying their motions for a mistrial. According to G.S. 15A-1061, a motion for a mistrial by a defendant should be granted when an occurrence during the trial results "in substantial and irreparable prejudice to the defendant's case." "The decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal." *State v. Mills*, 39 N.C. App. 47, 50, 249 S.E. 2d 446, 448 (1978), *disc. rev. denied*, 296 N.C. 588, 254 S.E. 2d 33 (1979). The defendants further contend that besides abusing his discretion the trial judge also violated the defendants' due process rights by failing to inform the defendants of the possible witness/juror misconduct prior to the *voir dire* hearing and by failing to allow the defendants a recess to investigate the matter.

State v. Rutherford

Due process requires that a defendant have "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed. 2d 751, 755 (1961). It is the duty and responsibility of the trial judge to insure that the jurors remain impartial and uninfluenced by outside forces. The defendants rely on *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959) for the proposition that in spite of the trial judge's finding that no prejudice to the defendant had occurred, a conviction nevertheless must be reversed if the jury has been "infected" by an outside source. As a general proposition, we would agree, but whether the alleged misconduct has affected the impartiality of a particular juror is a discretionary determination for the trial judge. "The reason for the rule of discretion is apparent. . . . The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings." *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E. 2d 51, 54 (1976). Misconduct must be determined by the facts and circumstances of each case, and "[t]he circumstances must be such as not merely to put a suspicion on the verdict, because there was an opportunity and a chance for misconduct, but that there was in fact misconduct.'" *State v. Johnson*, 295 N.C. 227, 234, 244 S.E. 2d 391, 396 (1978), quoting *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915). Furthermore, we find it important to note that the U.S. Supreme Court in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed. 2d 589 (1975) held that *Marshall* was not a constitutional ruling applicable to the States through the Fourteenth Amendment and had no application beyond the federal courts.

We believe, therefore, that due process did not require in the present case that the defendants be told of the alleged misconduct before the verdict had been reached or be allowed a recess to investigate on their own the witness/juror contact. Our determination instead must focus on whether the trial judge took the steps necessary to insure that the due process requirement of impartiality was maintained. In light of prior North Carolina decisions and from our review of the record, we hold that the judge did not abuse his discretion by denying the defendants' motions for a mistrial.

In *State v. Selph*, 33 N.C. App. 157, 234 S.E. 2d 453 (1977), a juror was seen talking with the defendant's accomplice's mother.

State v. Rutherford

The trial judge refused to allow the defendant to cross-examine the juror and failed to examine this juror individually himself, but rather put to the jurors generally whether they had discussed the case with anyone during a recess. In holding that the trial judge had not abused his discretion in conducting his investigation of the matter in this manner and that the inquiry was sufficient to satisfy due process, this Court noted that in most cases where the defendant's rights had been violated the trial court had refused to hold any sort of hearing, or the hearing that was conducted was inadequate to discover and evaluate the alleged jury misconduct under the circumstances. *See for example, State v. Drake, supra.*

In the present case, a *voir dire* hearing was conducted and was adequate to insure that no prejudice resulted to the defendants due to the conversation which occurred between the witness and the juror. Although the trial court was informed of this conversation after the final instructions to the jury had been given but prior to the completion of the jury's deliberation, it took no action until after the verdict, realizing that there would be time after a verdict had been reached to set aside any guilty finding if the facts so warranted. After the verdict was returned, the trial court immediately held a *voir dire* hearing and made a full inquiry into the facts and circumstances surrounding the conversation and whether the defendants had suffered prejudice by it. Both the witness and the juror were examined under oath. The defendants were afforded the full opportunity to ask questions concerning the contents of the conversation and its effect on Mr. Foggy. Upon discovering that the conversation lasted only minutes and did not concern the defendants' case or Mr. Foggy's jury service, the trial court concluded that the conversation had no effect on the verdicts rendered against the defendants and that the defendants had not been prejudiced thereby.

We reach the same conclusion as the Supreme Court in a factually similar case, *O'Berry v. Perry*, 266 N.C. 77, 145 S.E. 2d 321 (1965). After the jury in *O'Berry* had returned its verdict for the plaintiff, the defendant moved to have it set aside on the grounds that a meeting had occurred between a juror, the plaintiff, and a plaintiff's witness. The trial court made an immediate investigation and found: that they had walked to lunch together; that they had talked about fishing and not about the case; and that there had been no effect on the verdict. Relying on the trial court's in-

State v. Rutherford

vestigation, the Supreme Court found no abuse of discretion in denying the defendant's motion. Likewise, we have relied on the trial court's investigation and hold that the trial court did not abuse its discretion in the denial of the defendants' motions for a mistrial.

[2] The defendant Rutherford also assigns as error that the trial court entered a judgment of conviction against him although crucial portions of the evidence against him were inadmissible as hearsay. Basically, Rutherford contends that there is no competent evidence that tends to show that he actively participated in the robbery. He contends that the only competent evidence presented by the State merely shows that he was present at the scene of the crime. According to his brief, "[t]he only substantial evidence of Rutherford's having been a willing participant is contained in statements to which Burton Keeler testified. . . . Keeler reported that the three—Faust, Gorneault and Rutherford—had returned to the house of a mutual friend and that 'they' talked about 'what they did and how they did it.'" The trial judge allowed this testimony over repeated objections even though Keeler was unable to specifically recall exactly what each robber said: Keeler testified.

I can't recall anybody saying anything specifically because it has been so long. But, you know, pretty much all three of them were getting into the conversation and telling me how they did it.

* * *

They told me that they had picked up a GI hitchhiking, took him out to the reservation and robbed him with a sawed-off shotgun, took ninety dollars from him and showed me the belt they had took from him and the Buck knife.

Although the witness could not remember exactly what each defendant had said, it is clear that any statements made by the defendants in this context would be admissible as admissions. The statements that Keeler might have attributed to Gorneault would be admissible to corroborate Gorneault's earlier testimony that after the robbery they discussed or "boasted" in front of Keeler how they had committed the crime.

State v. Rutherford

However, contrary to Rutherford's contentions, there was other evidence presented that tended to show that he actively participated in the crime. Zortman testified that Rutherford stated during the robbery that if Zortman did not give them any trouble he would not be shot. Zortman also stated that although Rutherford did nothing in particular that stood out in his mind he mimicked the actions and statements of Faust who was holding the shotgun. Gorneault also indicated that Rutherford participated in the robbery by telling Zortman not to move.

The State's evidence shows therefore that although Rutherford was not present when Gorneault and Faust planned the robbery, he did go with them that night and helped Faust control Zortman's movements. Rutherford's defense at trial was that he was somewhere else at the time of the crime, not that he was there with Faust and Gorneault but did not take part in the robbery. We hold that the State presented sufficient evidence to show that Rutherford had in fact acted in concert with the others and that the trial judge properly entered the judgment of conviction against him.

[3] Defendant Faust further assigns as error the trial court's refusal to allow Gorneault to answer a question about the amount of time he would actually serve in jail pursuant to his plea bargain arrangement with the State for his testimony. Faust contends that the trial court's ruling prevented him from effectively impeaching Gorneault on the basis of his prejudice and bias in the State's favor. The pertinent discourse follows:

Q. Isn't it true, sir, that you know, of your own knowledge, that you will never serve eight years? You will serve three years and a few months?

[Prosecutor]: Object.

Court: Sustained.

[Prosecutor]: I would ask for a curative instruction.

Court: Members of the Jury, that is improper cross-examination. I instruct you not to consider that question nor any answer which may have been given.

Brooks, Comr. of Labor v. Butler

We hold that the trial court properly sustained the State's objection. Gorneault agreed to testify at trial in return for the State accepting his guilty plea to a reduced offense and a set sentence of eight years. G.S. 15A-1052(c) requires that the trial court "inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity." The record reveals that the trial court did inform the jury of the plea arrangement before the testimony of the witness was received. Thus, the jury knew that the witness was "receiving something of value in exchange for his testimony which might bear on his credibility." *State v. Hardy*, 293 N.C. 105, 120, 235 S.E. 2d 828, 837 (1977). The question of how much time Gorneault would actually spend in jail was speculative. Gorneault had only been guaranteed that he would receive a maximum sentence of eight years in jail. Whether his time could or would be shorter was beyond the knowledge of the State or the witness at this point, and in the future hands of the State Department of Correction.

Having reviewed the assignments of error raised by both defendants, we hold that no prejudicial error was committed.

No error.

Judges WEBB and EAGLES concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA v. CORNELIUS BUTLER, D/B/A BUTLER TRAILER MANUFACTURING COMPANY

No. 8319DC948

(Filed 16 October 1984)

1. Searches and Seizures § 22— administrative inspection warrant—probable cause

Probable cause for an administrative inspection warrant may be based on specific evidence of an existing violation or on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.

Brooks, Comr. of Labor v. Butler

2. Searches and Seizures § 22— administrative inspection warrant—probable cause

In order to meet the requirements of the second standard for establishing probable cause for an administrative inspection warrant, an applicant for the warrant must show: (1) there exists a legally authorized inspection program which naturally included the property; (2) the general administrative enforcement plan is based on reasonable legislative or administrative standards; and (3) the administrative standards are being applied to the particular establishment on a neutral basis.

3. Searches and Seizures § 23— administrative inspection warrant—probable cause

An application for an administrative inspection warrant set forth factual information sufficient to enable the magistrate to make an independent determination of the existence of probable cause that respondent was selected for inspection on the basis of a general administrative plan for enforcement of the Occupational Safety and Health Act which used neutral criteria in selecting respondent for inspection. The fact that the warrant application failed to state that the affiant had no higher priority inspection pending did not invalidate the warrant.

4. Searches and Seizures § 31— administrative inspection warrant—property to be searched

An administrative inspection warrant was not overbroad because it authorized the inspection of "all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials, and all other things."

5. Searches and Seizures § 19— administrative inspection warrant—no right to notice and opportunity to be heard

Respondent was not entitled to notice and an opportunity to be heard on an application for an administrative inspection warrant.

6. Rules of Civil Procedure § 52.1— failure to state findings and conclusions separately—absence of prejudice

Petitioner was not prejudiced by the failure of the trial court to state separately its findings of fact and conclusions of law in an order quashing an administrative inspection warrant where the court's findings and conclusions, though not readily distinguishable, were sufficient to permit meaningful appellate review. G.S. 1A-1, Rule 52(a)(1) and (2).

7. Appeal and Error § 45— the brief—failure to note exceptions or assignments of error

Appellee's cross-assignments of error were not properly before the appellate court where appellee's brief failed to note any exceptions or assignments of error to the questions presented. App. Rules 10(b), 25(b)(5) and 25(c).

APPEAL by petitioner from *Hammond, Judge*. Order entered 18 April 1983 in District Court, RANDOLPH County. Heard in the Court of Appeals 5 June 1984.

Brooks, Comr. of Labor v. Butler

This is a civil proceeding instituted by petitioner, Commissioner of Labor of the State of North Carolina, John C. Brooks, to compel respondent, Cornelius Butler, d/b/a Butler Trailer Manufacturing Company, to appear and show cause why he should not be held in contempt for refusal to honor an Administrative Inspection Warrant. Respondent answered, denying validity of the warrant, and counterclaimed for declaratory and injunctive relief.

After a hearing, respondent's motion to quash the inspection warrant was granted. From the order granting respondent's motion to quash the warrant and denying all other relief, both parties appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Tiara B. Smiley, for petitioner-appellant.

Hester, Johnson & Johnson, by W. Leslie Johnson, Jr., and McCarty, Wilson, Rader & Mash, by Robert E. Rader, Jr., for respondent-appellee.

JOHNSON, Judge.

On 21 December 1982, North Carolina Department of Labor Office of Occupational Safety and Health (hereinafter OSH) Officer John G. Morand and his area supervisor Frank K. Trogden went to the premises of respondent for the purposes of conducting a safety inspection in order to ascertain whether he was complying with the safety regulations of the Occupational Safety and Health Act of North Carolina (hereinafter OSHANC).

Morand and Trogden met with respondent, presented their credentials, and stated that they were there to conduct an OSH inspection. Respondent refused permission to proceed stating that OSH needed a warrant.

On 22 December 1982, Chief Magistrate Crofts, upon an *ex parte* application made on the same date by Morand, issued a warrant pursuant to G.S. 15-27.2 for the inspection of Butler Trailer Manufacturing Company (hereinafter Butler). On that same date, Morand and Trogden returned to Butler to serve the inspection warrant and to conduct the inspection of the premises. On the advice of his counsel, respondent refused entry to Butler on the grounds that the warrant was improperly issued, and that it

Brooks, Comr. of Labor v. Butler

violated the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

Following respondent's refusal to permit inspection, the Commissioner of Labor petitioned the district court for an adjudication of civil contempt.

After a hearing, the trial court held that the warrant was invalid and should be quashed because the warrant was issued *ex parte* and the supporting affidavit failed to provide the magistrate with information sufficient to determine: the reasonableness of the inspection program; and that the program was applied to Butler in a neutral manner.

The primary question presented by this appeal is whether the district court properly granted respondent's motion to quash the OSH inspection warrant. Petitioner contends that the warrant application was sufficient to permit the magistrate to make an informed probable cause determination. We agree.

The North Carolina Legislature has established pursuant to G.S. 95-136 a detailed program of inspection for industries to determine whether the workplace is free from recognized hazards which are likely to cause death or injury to the employees. Under the federal Occupational Health and Safety Act (hereinafter OSHA), North Carolina is permitted to administer and operate its own plan under federal supervision. 29 U.S.C.A. § 667. The entry and inspection provision of OSHANC are essentially identical to those of OSHA of 1970. In fact, OSHA has been adopted in this State pursuant to G.S. 95-131. For these reasons, federal court decisions interpreting OSHA have been followed by North Carolina courts when interpreting OSHANC.

[1] It is well recognized that administrative inspections of business establishments must conform to the Fourth Amendment which requires a finding of probable cause to support the issuance of a warrant. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed. 2d 305 (1978). *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967). Thus, a warrant based on probable cause is required for nonconsensual administrative inspections. Probable cause in the criminal sense is not required, however. *Marshall v. Barlow's Inc.*, *supra*, at 320, 98 S.Ct. at 1824, 56 L.Ed. 2d at 316. Specifically, probable cause for an administra-

Brooks, Comr. of Labor v. Butler

tion inspection warrant may be based on "specific evidence of an existing violation" or "a showing that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Id.* at 320, 98 S.Ct. at 1824, 56 L.Ed. 2d 316. *See also, Camara v. Municipal Court*, 387 U.S. at 538, 87 S.Ct. at 1727, 18 L.Ed. 2d at 930.

[2] In the case herein, petitioner relied on the second standard for establishing probable cause in seeking its inspection warrant. In order to meet the requirements of this standard, an applicant for an inspection warrant must show that: (1) there exists a legally authorized inspection program which naturally included the property; (2) that the general administrative enforcement plan is based on reasonable legislative or administrative standards; and (3) that the administrative standards are being applied to the particular establishment on a neutral basis. *Gooden v. Brooks, Comr. of Labor*, 39 N.C. App. 519, 251 S.E. 2d 698 (1979), *cert. granted*, 297 N.C. 299, 254 S.E. 2d 923, *cert. vacated*, 298 N.C. 806, 261 S.E. 2d 919 (1979). G.S. 15-27.2. These requirements comport with the *Barlow's* and *Camara* requirements that the warrant application show that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources," and "that the general administrative plan for enforcement is based upon reasonable legislative or administrative standards." *Id.* at 524, 251 S.E. 2d at 702.

In its warrant application, which expressly incorporated by reference a supporting affidavit, petitioner gave a detailed description of the administrative inspection program that led to respondent's selection for inspection. The supporting affidavit in pertinent part states:

2. OSH is charged with the administration of OSHANC pursuant to G.S. 95-133. OSHANC authorizes the establishment of a program of inspection for places of employment by representatives of the Commissioner of Labor for the purpose of determining whether an employer is furnishing its employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical injuries to its employees, and whether an employer is complying with OSHANC and the

Brooks, Comr. of Labor v. Butler

rules and regulations promulgated thereunder. G.S. 95-129 and 95-136.

. . . .

ADMINISTRATIVE STANDARDS FOR
THE GENERAL SCHEDULE INSPECTION PROGRAM

5. OSH utilizes a detailed procedure for identifying and selecting particular work establishments for inspection under the General Schedule Inspection Program. The administrative standards or neutral selection factors used to develop the program are designed to provide broad representative inspection coverage of working conditions and to place priority on the most hazardous employment classifications. These factors include: (1) frequency of injury and illness, (2) severity of injury and illness, (3) industry employee density, (4) length of time since last inspection, (5) geographic dispersion of inspection activity, (6) enforcement penetration into a diversity of industrial categories. (OSH Operations Manual, Chapter III.)

6. A selection process had been established by the Enforcement Bureau in conjunction with the Research and Statistics Division of the North Carolina Department of Labor and OSH's Engineering and Research Bureau. Incorporating the above stated administrative standards and selection factors, the U.S. Department of Labor, Bureau of Labor Statistics, in cooperation with the Research and Statistics Division has developed a Hazard Index, which is a function of the lost workday case incidence rate (frequency), the lost workday incidence rate (severity), and industry employee density. Using data compiled in statewide occupational injuries and illnesses surveys, the Research and Statistics Division annually computes the hazard index for each of the approximately sixty Standard Industrial Classification (SIC) Codes relevant to this State. . . .

. . . .

8. Random selection of individual work establishments is accomplished by a computer program developed and maintained for OSH by the Department of Administration Management Information Services Division. The LI100 OSHA

Brooks, Comr. of Labor v. Butler

Sites Inspection System is a series of computer programs that randomly selects the sites and produces the inspection report. The computer data base includes a comprehensive Employment Security Commission master list of state businesses and industries with SIC classifications. . . .

. . . .

APPLICATION OF THE
STANDARDS TO THE
NAMED ESTABLISHMENT

9. According to data supplied by the Research and Statistics Division, the industrial classification of SIC Code 37-Transportation Equipment has a hazard index of 11 and with a number 16 ranking falls within the upper half of the "high hazard" list established by OSH for North Carolina. The named establishment Butler Trailer Manufacturing Company is a manufacturer of automobile trailers within SIC Code 3799 and was chosen for a general schedule inspection in accordance with the statistical process of random selection and the administrative standards set out in paragraphs 5-8 above, without the influence of any other factors.

[3] As shown by the data quoted above, the warrant application clearly presented information meeting the probable cause requirements. The affidavit in support of the warrant application adequately described the program of inspection designed to result in neutral enforcement of OSH. Ninety-five percent of the industries with high hazard incidents, are selected for general inspection. The hazard index of each industry is derived by correlating the lost workday case incidence rate with the lost workday incidence rate and the industry employee density. This data is then used to rank industries in descending order in accordance with their Standard Industrial Classification (SIC) Codes. Utilizing this data, the OSH computer selects individual industries randomly from a candidate file consisting of a master list of state businesses compiled by the Employment Security Commission of North Carolina. The selected sites are printed out in random site inspection reports which are distributed to the three area supervisors who make the safety officer assignments.

Brooks, Comr. of Labor v. Butler

[4] Unquestionably, the warrant application sets forth factual information sufficient to enable the magistrate to make an independent determination of the existence of probable cause that respondent was selected for inspection on the basis of a general administrative plan for enforcement of OSH which used neutral criteria in selecting respondent for inspection. The fact that the warrant application failed to state that affiant had no higher priority inspection pending does not invalidate the warrant. Nor do we believe that a warrant authorizing inspection of "all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials, and all other things . . ." is overbroad. A warrant authorizing a general inspection of an industry naturally contemplates a comprehensive inspection since the location of possible violations is unknown. In the matter of *Establishment Inspection of Texas Tank Car Works*, 597 F. Supp. 591 (N.D. Tex. 1984); *Ingersoll-Rand Co. v. Donovan*, 540 F. Supp. 222 (M.D. Pa. 1982). Accordingly, we find that it was error for the trial court to grant respondent's motion to quash the administrative inspection warrant.

[5] We briefly note two other points raised by petitioner. The first of these contentions is that the trial court erred in holding that federal and state case law required that respondent be given notice and opportunity to be heard on the warrant application.

Ex parte warrants are authorized by the regulations governing OSHA search warrants, 29 C.F.R. § 1903.4(d), and they have been approved by most federal courts which have considered the question. *Rockford Drop Forge Co. v. Donovan*, 672 F. 2d 626 (7th Cir. 1982); *Erie Bottling Corp. v. Donovan*, 539 F. Supp. 600 (W.D. Pa. 1982); *Matter of Establishment Insp., ETC*, 510 F. Supp. 314 (W.D. Va. 1980), *aff'd*, 644 F. 2d 880 (4th Cir. 1981); *Donovan v. Blue Ridge Pressure Castings, Inc.*, 543 F. Supp. 53 (M.D. Pa. 1981).

OSHANC contains a section consistent with 29 C.F.R. 1903.4(d) which reads in applicable part:

(d) For purposes of this Section, the term compulsory process shall mean the institution of any appropriate action, including *ex parte* application for an inspection warrant or its equivalent. *Ex parte* inspection warrants shall be the preferred form of compulsory process in all circumstances where

Brooks, Comr. of Labor v. Butler

compulsory process is relied upon to seek entry to a workplace under this Section.

13 NCAC 7B 0104(d).

G.S. 95-136(f) provides:

(1) Inspections conducted under this section shall be accomplished without advance notice, subject to the exception in subdivision (2) below this subsection.

(2) The Commissioner or Director may authorize the giving to any employer or employee advance notice of an inspection only when the giving of such notice is essential to the effectiveness of such inspection, and in keeping with regulations issued by the Commissioner.

Read together, the conclusion, that *ex parte* warrants are not only authorized but are the preferred means of compulsory process, is inescapable. Accordingly, we hold that *ex parte* warrant proceedings are authorized under the rules and regulations of OSHA and OSHANC and have been judicially approved by substantial case law.

[6] Second, petitioner assigns error to the failure of the trial court to make findings of fact in support of its Order quashing the inspection warrant.

G.S. 1A-1, Rule 52(a)(2) requires the trial judge to find the facts upon which he bases his ruling when they are requested by a party or required by Rule 41(b) which is not applicable here. Although petitioner's timely request for findings of fact was denied, the trial court made findings of fact which were intertwined with its legal conclusions. We do not believe, however, that petitioner was prejudiced by the trial court's failure to state separately its findings of fact and conclusions of law as required by G.S. 1A-1, Rule 52(a)(1). As stated, the trial court's findings of fact and conclusions of law, although not readily distinguishable, were sufficient to permit meaningful appellate review.

[7] We note finally, that respondent-appellee presented alternative questions for review, pursuant to Rule 10(d) of the Rules of Appellate Procedure, which reads in part:

Sloop v. Friberg

(d) Exceptions and Cross Assignments of Error by Appellee. Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

However, such questions are for review only when they are based on cross-assignments of error. Rule 10(d) Comment. Respondent's brief violates Rule 28(b)(5) of the Rules of Appellate Procedure, which is made applicable to appellee's brief by Appellate Rule 28(c). Rule 28(b)(5) provides that: "immediately following each question shall be a reference to assignments of error and exceptions pertinent to the question. . . ." Respondent's brief fails to note any exceptions or assignments of error relating to the questions presented, therefore, his cross-questions are not properly before the Court. The Court, however, in its discretion considered respondent's questions, but only insofar as they related to the assignments of error properly before the Court.

In summary, we hold that the trial court improperly granted respondent's motion to quash the administrative inspection warrant. Accordingly, the Order appealed from is, thereby, vacated, and the cause is remanded to the trial court for proceedings not inconsistent with this opinion.

Judges WEBB and PHILLIPS concur.

DAVID A. SLOOP AND WIFE, SALLY CLARK SLOOP v. CHARLES A. FRIBERG

No. 8315DC1014

(Filed 16 October 1984)

1. Infants § 5; Divorce and Alimony § 23— jurisdiction—child custody and support—prior judgment

The District Court did not usurp any other body's power, nor did it totally lack jurisdiction, where respondent had withdrawn his appeal and acquiesced for several years in an earlier judgment from District Court, and where

Sloop v. Friberg

district courts undoubtedly possess general subject matter jurisdiction over child custody disputes. G.S. 7A-244; G.S. 50A-1 *et seq.*; G.S. 1A-1, Rule 12(h)(3).

2. Trial § 6; Divorce and Alimony § 25.3— stipulation—binding

Respondent cannot now complain of the result where the parties stipulated that they were willing to allow the court to enter final judgment on custody and visitation issues in accordance with the wishes of the three children, where nothing suggests that petitioners concealed anything from respondent or otherwise misled him, and where no motion to set aside the stipulation appears.

3. Infants § 6.7; Divorce and Alimony § 25.12— restrictions on visitation—findings required

G.S. 50-13.5(i) requires specific findings of fact to justify restrictions on visitation allowing the custodian to determine times, places, and conditions of visitation.

4. Parent and Child § 7; Divorce and Alimony § 24.9— child support—findings required

There were insufficient findings to support an award of child support where the court made no findings as to the total value of either the respondent's or petitioners' "estate," despite extensive evidence on the subject; as to the "accustomed standard of living of the children and the parties;" and did not consider as income the value of petitioners' house, a parsonage, which is excluded for income tax purposes but should be included in a consideration of family financial standing under G.S. 50-13.4. Furthermore, the recommended practice is to make findings and conclusions as to the *reasonable needs* of the children for health, education, and maintenance. G.S. 50-16.5(a); G.S. 105-141(b)(6); G.S. 105-134; 26 U.S.C. § 107.

5. Divorce and Alimony § 27— attorneys' fees—support staff—separate award upheld

The court did not err in awarding an amount for staff time in addition to attorneys' fees. While the practice of figuring staff time into a single hourly rate may be preferable, it is not required.

6. Divorce and Alimony § 24.9; Trial § 58.3— conflicting evidence—findings conclusive

The fact that there were inconsistencies between the actual dollar amounts testified to and those in a child support order does not in and of itself constitute error where the inconsistencies were *de minimis*, the court had before it conflicting evidence, and respondent did not show the denial of a substantial right. G.S. 1A-1, Rule 61.

7. Divorce and Alimony § 24.1; Parent and Child § 7— children's property—consideration not required

There was no error in the court's failure to consider the children's substantial trust accounts; application of the separate property of minors need only be resorted to "if appropriate." G.S. 50-13.4(b).

Sloop v. Friberg

8. Appeal and Error § 42— matters not in record—not considered

Respondent may not base a contention on comments by the trial judge that are not in the record. Moreover, when a panel of the Court of Appeals has denied a petition for certiorari to include the comments of the trial judge, a succeeding panel may not review or reverse that decision. App. Rule 9(a).

APPEAL by respondent from *Harris, W. S., Jr., Judge*. Judgment entered 29 April 1983 in District Court, ALAMANCE County. Heard in the Court of Appeals 7 June 1984.

Respondent Friberg was married to petitioner Sally Sloop's sister, who died in 1978, leaving three minor children with Friberg. Because of a variety of health and personal problems, Friberg sent the children to live with the Sloops in North Carolina. The Sloops obtained orders awarding them custody and child support in September 1980. Friberg had visitation rights, which were restricted, due to his inattention in 1981. In November 1982 the Sloops petitioned the court for payment of back child support; Friberg responded by petitioning for custody based on changed circumstances. Upon hearing, the court (1) ordered continued custody in the Sloops, (2) ordered payment of child support, both accrued and prospective, and attorneys' fees, and (3) continued the restrictions on visitation. Friberg appeals. Further facts are set out as necessary in the opinion.

Nichols, Caffrey, Hill, Evans & Murrelle, by William W. Jordan, Fred T. Hamlet, and Richard J. Votta, for respondent-appellant.

Vernon, Vernon, Wooten, Brown and Andrews, P.A., by Wiley P. Wooten and T. Randall Sandifer, for petitioner-appellees.

JOHNSON, Judge.

I

[1] Friberg first challenges the district court's exercise, beginning in 1980, of subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act ("the Act"), G.S. 50A-1 *et seq.* (Cum. Supp. 2A 1983). It is true that the question of subject matter jurisdiction may be raised at any point in the proceeding, and that such jurisdiction cannot be conferred by waiver, estoppel or

Sloop v. Friberg

consent. G.S. 1A-1, Rule 12(h)(3); *In re Custody of Sauls*, 270 N.C. 180, 154 S.E. 2d 327 (1967). However, the district courts of this State do undoubtedly possess *general* subject matter jurisdiction over child custody disputes. G.S. 7A-244. Such matters are in nowise reserved by the Constitution or laws of North Carolina to the *exclusive* consideration of another tribunal. *Id.*; see *Henderson County v. Smyth*, 216 N.C. 421, 422, 5 S.E. 2d 136, 137 (1939). The real question under the Act is whether such jurisdiction is *properly exercised* according to the statutory requirements *in this particular case*. See G.S. 50A-3; *Jerson v. Jerson*, 68 N.C. App. 738, 315 S.E. 2d 522 (1984); *Bryan v. Bryan*, 66 N.C. App. 461, 311 S.E. 2d 313 (1984). The court's 1980 findings relative to the jurisdictional prerequisites of the Act, see G.S. 50A-3, appear sufficient on their face to justify exercising jurisdiction. Friberg does not, on this appeal, point to any *substantive* deficiencies therein. He chose to withdraw his appeal in 1980 and to acquiesce in the judgment for several years. Accordingly, we hold that he has failed to preserve his objection and the assignment is without merit.

Language in the earlier cases supports this holding. An *absolute want* of subject matter jurisdiction might constitute a fatal deficiency, but consent to judgment and acquiescence thereto over a period of years was held grounds to deny a subsequent motion attacking it. *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E. 2d 876, 880 (1961). See also *Branch v. Houston*, 44 N.C. (Busb. Eq.) 85 (1852) ("total want" of jurisdiction); 21 C.J.S. Courts § 110 (1940). Similarly, where the Constitution expressly and exclusively vested power to levy taxes in the legislature, acts of the superior court purporting to list and assess property constituted "an act of usurpation." *Henderson County v. Smyth*, *supra*, at 423, 5 S.E. 2d at 138. On this record the District Court of Alamance County did not usurp any other body's power, nor did it totally lack jurisdiction. No timely objection having been made, the assignment is overruled.

II

A

[2] Prior to hearing on the support issues, the parties stipulated that they were willing to allow the court to enter final judgment on the custody and visitation issues in accordance with the wishes

Sloop v. Friberg

of the three children. Friberg now raises various assignments of error to the result, which following the express desires of the children, continued permanent custody with the Sloops and restricted visitation to North Carolina. The stipulation is binding, however, and these assignments are without merit. Courts look with favor on stipulations designed to simplify litigation. *Heating Co. v. Construction Co.*, 268 N.C. 23, 32, 149 S.E. 2d 625, 631 (1966). Nothing suggests that the Sloops concealed anything from Friberg or otherwise misled him. See *R.R. Co. v. Horton*, 3 N.C. App. 383, 387, 165 S.E. 2d 6, 8 (1968). No motion to set aside the stipulation appears. *Id.* at 389, 165 S.E. 2d at 10. Therefore, Friberg cannot now complain of the result, which simply continued the status quo, following the clearly expressed wishes of the children. *Id.* (affirming order based on stipulation to abide by result of parallel case).

B

[3] One portion of the order, not covered by the stipulation, does however deserve further attention. The court ordered that visitation in North Carolina occurs at times and places agreeable to, and under such terms and conditions as set by, the Sloops. This Court has consistently held that G.S. 50-13.5(i) requires specific findings of fact to justify such restrictions. *Johnson v. Johnson*, 45 N.C. App. 644, 647, 263 S.E. 2d 822, 824 (1980) (no evidence of abuse, abduction or hostility; error to require presence of custodial parent); *King v. Demo*, 40 N.C. App. 661, 666-68, 253 S.E. 2d 616, 620-21 (1979) (error to deny visitation where court found parent fit and no other findings); *In re Custody of Stancil*, 10 N.C. App. 545, 551-52, 179 S.E. 2d 844, 849 (1971) (error to allow custodian to determine times, places, and conditions). This portion of the order therefore is improper and must be remanded for further proceedings. We note that the limitation of visitation to North Carolina complies with the wishes of the children and does not itself constitute an improper restriction requiring remand. See *Johnson v. Johnson*, *supra* (similar limitation approved). The question on remand should accordingly be only the scope of visitation in North Carolina, unless changed circumstances warrant some other arrangement.

Sloop v. Friberg

III

[4] Finally, Friberg challenges the sufficiency of the findings of fact to support the monetary awards to the Sloops. We turn for guidance in considering these assignments to the recent and authoritative opinion of Justice Carlton in *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). Although *Quick* dealt only with alimony, it applies equally to child support cases. *Id.* at 458, 290 S.E. 2d at 661. See G.S. 50-13.4(c) (child support); G.S. 50-16.5(a) (alimony) (nearly identical provisions). *Quick* has not since been modified by the Supreme Court or the General Assembly.

In considering the sufficiency of the evidence and findings to support an award of child support, we start with the settled rule that once an award is found to be justified, the amount lies within the trial court's discretion and will not be disturbed absent manifest abuse. *Quick, supra*, at 453, 290 S.E. 2d at 658; see *Minges v. Minges*, 53 N.C. App. 507, 281 S.E. 2d 88 (1981) (same rule for child support). Since review of that discretion may only be by appeal, the trial court must apply and consider the statutory factors and those required by the case law, in order to provide the appellate courts with a proper record for review. *Quick, supra*, at 453-54, 290 S.E. 2d at 658-59. This means that the trial court must make specific findings on each of the factors specified in G.S. 50-13.4(c). See *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). In addition, the case law may require certain findings, as when the award is based on earning capacity rather than present income. See *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E. 2d 407, 410 (1976). It is not enough that the record contain evidence from which such findings might be made, but the trial court itself must determine the credibility of the evidence and what it establishes. *Quick, supra*, at 454, 290 S.E. 2d at 659. Once the trial court has made such findings, they are conclusive if supported by any evidence, even if there is evidence contra. *Cox v. Cox*, 33 N.C. App. 73, 234 S.E. 2d 189 (1977). Applying the foregoing principles, we find that the order appealed from does not measure up to the requirements of the law, and must accordingly remand.

A

Despite extensive evidence on the subject, the trial court made no findings as to the total value of either Friberg's or the

Sloop v. Friberg

Sloops' "estate." Such a finding is required. G.S. 50-13.4(c); *Quick, supra*, at 455, 290 S.E. 2d at 659-60.

B

The trial court also failed to make any findings regarding the "accustomed standard of living of the [children] and the parties." Such findings are also required. G.S. 50-13.4(c); *Quick, supra*, at 456, 290 S.E. 2d at 660. *See also Williams v. Williams*, 299 N.C. 174, 181, 261 S.E. 2d 849, 855 (1980) (defining purpose of "accustomed standard").

C

The trial court considered the earnings of both Friberg and the Sloops in its order. It did not consider as income the value, rental or otherwise, of the Sloops' home, a parsonage supplied by David Sloop's church. We are aware that such rental value is specifically excluded from income for income tax purposes. G.S. 105-141(b)(6); 26 U.S.C. § 107. However, such an exemption constitutes a matter of limited legislative grace relative to income taxation. *Ward v. Clayton, Com'r of Revenue*, 5 N.C. App. 53, 58, 167 S.E. 2d 808, 811 (1969), *aff'd*, 276 N.C. 411, 172 S.E. 2d 531 (1970); *see C.I.R. v. Jacobson*, 336 U.S. 28, 69 S.Ct. 358, 93 L.Ed. 477 (1949) (exemptions should be construed with restraint in light of policy to tax income comprehensively) and G.S. 105-134. No authority suggests that this limited act of legislative grace should extend to exclude an item of such obvious value and importance from the wide-ranging consideration of family financial standing mandated by G.S. 50-13.4. The court therefore should consider this evidence in its findings on remand.

D

The trial court did not make any finding or conclusion as to the *reasonable needs* of the children for health, education, and maintenance, although it did hear testimony and receive considerable documentary evidence from the Sloops regarding their actual expenditures. Our Supreme Court has expressly held that such a failing does not necessarily constitute error, since the reviewing court may presume that the balance sheets have been reviewed and found reasonable. *Coble v. Coble, supra*, at 714, 268 S.E. 2d at 190. The court will have an opportunity to align the order with recommended practice on remand in any event.

Sloop v. Friberg

E

[5] Friberg excepts to the court's award, in addition to an unexpected award of some \$2,000 in attorneys' fees, of \$73.20 in staff time; he relies on *Williams v. Williams*, 42 N.C. App. 163, 256 S.E. 2d 401 (1979), *aff'd in relevant part*, 299 N.C. 174, 261 S.E. 2d 849 (1980). *De minimis* considerations aside, *Williams* clearly dealt with an award of litigation expenses to a party, not for staff support of counsel. Attorneys do not work in a vacuum, and staff support and other expenses are an inevitable part of practicing law. It would exalt form over substance to deny this award when many attorneys simply figure staff time into a single hourly rate. For purposes of uniformity of review, such practice of setting a single hourly rate may be preferable, but it is not required. The award lay within the court's discretion and we perceive no abuse.

F

[6] Friberg next points to the dollar amounts testified to at trial and the amounts reflected in the court's order, complaining of error and unfair bias. The trial court heard two stories in this case: Friberg's evidence showed good faith and a generous willingness to support and care for his children; the Sloops' evidence showed a pattern of grandiose but unfulfilled promises of support. The trial judge, doing his lawful duty, decided which story was worthy of belief and ruled accordingly. This Court, without the witnesses in front of it, should not reverse his determination as to credibility, nor will we "keep score" as to how many times he believed one side or the other.

The fact that there are some inconsistencies between the actual dollar amounts testified to and those in the order does not in and of itself constitute error. None of the cited inconsistencies appears to be more than *de minimis*. Assuming error, *arguendo*, Friberg still must show that the effect amounted to the denial of a substantial right. G.S. 1A-1, Rule 61; *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E. 2d 204 (1983). Considering the discretionary nature of the award, and the amounts awarded, we conclude from the present record that he has failed to make such a showing.

Sloop v. Friberg

G

[7] The three children each have substantial trust accounts arising from a wrongful death suit on behalf of their mother's estate. The court did not consider these in its order. It did not, as Friberg now contends, commit error. Application of the separate property of minors need only be resorted to "if appropriate." G.S. 50-13.4(b). We find nothing in the statute to suggest any legislative intent to change the firmly established rule that the supporting parent who can do so remains obligated to support his or her minor children, even though they may have property of their own. *Lee v. Coffield*, 245 N.C. 570, 96 S.E. 2d 726 (1957); see 3 R. Lee, N.C. Family Law, § 229 at 118-19 (4th ed. 1981). This assignment therefore is without merit, since the court rejected Friberg's evidence of total inability to pay.

IV

[8] Friberg also contends that the trial judge decided the case before hearing all the evidence, relying on alleged comments by Judge Harris. The Sloops argue that these comments are not in the record and thus cannot be reviewed. Friberg has earlier petitioned this Court for a writ of certiorari to have the contested statements included in the record. That petition was denied on 10 October 1983 by Judges Hedrick, Braswell and Johnson. This succeeding panel may not review or reverse that decision. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629, *reh'g denied*, 307 N.C. 703 (1983). Review in the Court of Appeals is on the record, and the Court may not consider extraneous matter not properly presented. App. R. 9(a); see *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976). This claim has been ruled on once and the assignment therefore is not before us and must be overruled.

V

Having found error, we now must decide the proper disposition of the case. The findings on support, while erroneous, are not so "woefully inadequate" to require a new trial on all issues. See *Quick, supra*, at 458-59, 290 S.E. 2d at 661-62. Rather, we simply vacate the erroneous portions and remand for such further proceedings as may be necessary to correct the errors discussed above. See *Campbell v. Campbell*, 63 N.C. App. 113, 304 S.E. 2d

Bunn v. N. C. State University

262, *disc. review denied*, 309 N.C. 460, 307 S.E. 2d 362 (1983). The remaining portions of the order are affirmed. *Id.*

Affirmed in part; vacated and remanded in part.

Judges WEBB and PHILLIPS concur.

ELGIE G. BUNN, CLAIMANT-APPELLANT v. N. C. STATE UNIVERSITY, D. H. HILL LIBRARY AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT-APPELLEES

No. 8310SC1239

(Filed 16 October 1984)

Master and Servant § 108— unemployment compensation—leaving work between notice of discharge and formal discharge

Where claimant was informed by her supervisors after a trial period that her job performance as a library aide was "pitiful," that she was unqualified to do the work as a library aide, and that she would be discharged at the end of the month, and claimant informed the employer that she would not return to work to finish out the month, claimant did not leave work voluntarily or without good cause attributable to her employer and was entitled to unemployment compensation for the time between her notice of discharge and her formal discharge. G.S. 96-14(1).

APPEAL by plaintiff from *Smith, J.* Judgment entered 22 June 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 20 September 1984.

Elgie Bunn was an employee of North Carolina State University from August 1978 until 11 June 1982. She worked as a mail clerk from August 1978 until May 1982. Nearly a year after she began work in the mail room, she developed pain and swelling in her right wrist. This appeared to be due to the strain involved in her work, pushing a mail cart and lifting heavy objects. Although she favored her right hand, the pain persisted. She sought medical help in February 1979, and had a synovial cyst removed from the right wrist joint. She returned to the mail room. In April 1982 plaintiff injured her wrist, and had to have another operation to remove a ganglion cyst. Two months later, her doctor told her she could return to work but cautioned her to avoid straining her

Bunn v. N. C. State University

right hand, and told her only to lift and push heavy objects as she felt able. She requested a transfer to another job, even though her hand was not completely healed. Her supervisor told her that due to the hiring freeze, no work was available except in the mail room. Later, her supervisor informed her that a temporary part-time position was available at the library circulation desk. Plaintiff accepted the job and gave it her best. Yet, about one and one-half weeks after she began, she was told by her supervisors that she was not qualified for the job, *i.e.*, that her on-the-job test results were "pitiful," that she worked slowly, and that her spelling was poor. On hearing this, she became emotionally upset. She requested to be able to finish the week. Her supervisors told her she could finish the month. Because her supervisors told her she was so unqualified for the position as library aide, she "lost her confidence" and over the weekend decided she could not return to her job. She called one of her supervisors and told him she did not wish to return. He requested that if she was not coming back that she send a note resigning her position as a mail clerk so that when the hiring freeze was over he could hire someone. She did this.

Plaintiff filed for unemployment benefits on 13 June 1982 for the period 13 June-19 June 1982. Her request was denied by an Appeals Referee and by the Employment Security Commission. The plaintiff then appealed to the Superior Court of Wake County, which affirmed the decision of the Employment Security Commission. Plaintiff now appeals the decision of the Superior Court.

Kathryn S. Aldridge for appellee Employment Security Commission of North Carolina.

East Central Community Legal Services, by Victor J. Boone, for plaintiff appellant.

ARNOLD, Judge.

The plaintiff, Elgie G. Bunn, claims that the Wake County Superior Court erred in affirming a determination of the Employment Security Commission (ESC) that she was disqualified from receiving unemployment benefits for the period 13 June-19 June 1982. Ms. Bunn argues that the ESC made incorrect findings of fact and that the ESC improperly applied the law, G.S. 96-14(1), to

Bunn v. N. C. State University

the facts as found. Because she failed to make timely and particular objections to the ESC's findings of fact, Ms. Bunn has failed to preserve exceptions to those findings for our review. *See In re Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 364, 291 S.E. 2d 308, 309 (1982); *Hoover v. Crotts*, 232 N.C. 617, 61 S.E. 2d 705 (1950). The scope of our inquiry, then, is limited to determining whether the ESC and the Superior Court correctly interpreted the law and properly applied it to the facts as found. In other words, we must say whether the ESC's findings of fact, in light of the applicable law, support its determination.

The legal question we face is how to construe the "voluntary quit" provision of the Employment Security Law, G.S. 96-14(1), which disqualifies from unemployment benefits any person "unemployed because he left work voluntarily without good cause attributable to the employer." In the case at bar, this question becomes whether G.S. 96-14(1) disqualifies a person, like Ms. Bunn, who has left work between her "notice of discharge" and the date on which she is formally discharged. We note that in this case Ms. Bunn only claims benefits for this period, and not for the period after her final discharge date.

We recently considered the "voluntary quit" provision in *Eason v. Gould, Inc.*, 66 N.C. App. 260, 311 S.E. 2d 372 (1984), a case involving an employee who left work after hearing from fellow employees that she would be laid off due to a "slow down" at the plant where she worked. In *Eason*, this court determined that the claimant was entitled to benefits after the effective lay-off date, but not before. In the case at bar, the claimant, after a trial period, was informed by her supervisors that she was not capable to do the work as a library aide and that she accordingly was to be discharged at the end of the month. She "lost her confidence" and informed her employer that she would not work through the last possible day. There are significant differences between the facts of this case and the facts of *Eason*, and therefore we undertake a fresh analysis.

Our interpretation of G.S. 96-14(1) is guided by a special rule of construction: that the disqualification rules be applied strictly in favor of the claimant. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). This rule stems from the legislative policy behind the Employment Security Law, conceived during the Great Depres-

Bunn v. N. C. State University

sion of the 1930's, to provide support for persons who are able and willing to work, but who have become unemployed because of conditions of their former employment, and who continue to be unemployed because of generally depressed labor market conditions in their community. See G.S. 96-2. The meaning of this rule of construction and the policy behind it is that where a statutory term is vague, and the claimant is arguably covered, the claimant should be given the benefit of the doubt.

Section 96-14(1) provides that for Ms. Bunn to have been disqualified she must have left work "voluntarily." The definition of "voluntarily" is:

1. Of one's own free will or accord; without compulsion, constraint, or undue influence by others; freely, willingly.
2. *Without other determining force than natural character or tendency; naturally, spontaneously.*
3. At will, at pleasure; extempore.

Oxford English Dictionary (emphasis added). See also Webster's New International Dictionary (2d ed.).

Although Ms. Bunn did have to make the ultimate choice not to return to work, still we cannot say that her decision was entirely free, or spontaneous. We agree with the court in *Dept. of Labor and Industry v. Unemployment Compensation Board of Review (In Re John Priest)*, 133 Pa. Super. 518, 3 A. 2d 211 (1938), that an individual's decision to leave work when informed of an imminent discharge or layoff is a consequence of the employer's decision to discharge and is not wholly voluntary.

Yet, even if voluntary, Ms. Bunn's decision to leave would not disqualify her if she acted with "good cause attributable to [her] employer." "Good cause" has been defined as a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. See *In re Clark*, 47 N.C. App. 163, 266 S.E. 2d 854 (1980). "Attributable to the employer" in G.S. 96-14(1) means "produced, caused, created or as a result of actions" by the employer. *In re Vinson*, 42 N.C. App. 28, 31, 255 S.E. 2d 644, 646 (1979).

In the case *In re Clark*, 47 N.C. App. 163, 266 S.E. 2d 854 (1980), this court found that an employee's decision to leave work

Bunn v. N. C. State University

on ethical grounds was with "good cause attributable to the employer." The claimant in that case was a social worker who had induced two clients to sign Boarding Home Agreements to place their children in the temporary care of other people by assuring them that no custody proceedings would occur and that their children could return to them later. These arrangements were consistent with previous department policy. The social worker's supervisor, however, then instructed her to initiate custody proceedings, even though she had assured the clients that this would not occur. The social worker, because of these incidents, felt she could not ethically continue her employment, and resigned. This court found that the social worker left with good cause attributable to the employer. Moreover, it rejected the ESC arguments, that the social worker failed to try to resolve the conflict, as irrelevant, citing *In re Werner*, 44 N.C. App. 723, 263 S.E. 2d 4 (1980).

If in *Clark* a person who felt she was not able to perform her work because of an ethical dilemma had good cause to leave, then surely Ms. Bunn, who lost confidence and felt she could not continue her work because her employer informed her she was not qualified to do the work, also had good cause to leave. Reasonable men and women, placed in Ms. Bunn's position, and exposed to the humiliation and embarrassment of knowing that supervisors and co-workers regarded their work as "pitiful," would reasonably seek other work. Ms. Bunn's decision to leave, once notified that she was discharged, did not reflect an unwillingness to work and be self-supporting, or to live in compensated idleness.

Our conclusion that Ms. Bunn acted reasonably is reinforced by our belief that, if Ms. Bunn was not disqualified from benefits under G.S. 96-14(1), the ESC would have approved her refusal to accept work like the library aide job on the ground of "unsuitability" under G.S. 96-14(3). If, once she is unemployed and receiving benefits, such a job is not "suitable," and refusing it will not stop her benefits, why must her refusal to continue at it, after she has been told she is not qualified to do it, prevent her from receiving benefits in the first place? If we find that Ms. Bunn cannot receive benefits now, but that she can continue to get them later, on refusing this type of job, then we create a logical inconsistency in the construction of the act. See *K. Kempfer*, Dis-

Bunn v. N. C. State University

qualifications for Voluntary Leaving and Misconduct, 55 Yale L. J. 147, 155-56 (1945) and cases cited therein.

Thus, we hold that when Ms. Bunn was told that she was discharged because she was not qualified for her work but was allowed to stay on for a short period, she should not be disqualified from receiving benefits under G.S. 96-14(1) where she left work after her date of notice but in advance of the last possible day she could work.

The ESC's findings do not persuade us that Ms. Bunn could have pursued other alternatives at North Carolina State. The ESC's findings on Ms. Bunn's medical condition, and on her resignation of her job as mail clerk, are insufficient to support its conclusion that she could have returned to that job. The ESC found that: Ms. Bunn "believed she was physically unable to return to this job [as mail clerk]. There is no medical documentation that she was physically unable to work as a mail clerk on June 25, 1982." The lack of medical records attesting that she was "physically unable" as of 25 June 1982, is not of itself sufficient to determine the question of whether reasonable men and women would have good cause to leave the mail clerk position because it posed a threat to health or safety.

The ESC made no other findings as to job availability in the North Carolina State community at the time Ms. Bunn sought a transfer from her mail clerk position, at the time she left her position as library aide, or at the time of her formal resignation from the mail clerk position. There are insufficient findings of fact, therefore, to support its arguments that Ms. Bunn could have found other work at North Carolina State.

The Employment Security Law is designed to provide for the general welfare of North Carolina citizens. In a case like this, where an employee is discharged and leaves a few days in advance of her final work day, we do not believe that the law is so harsh that it would deny her benefits, either before or after the formal date of discharge. The principle that we should construe the disqualification provisions to the benefit of the claimant only reinforces our feeling that G.S. 96-14(1) was not intended to bar Ms. Bunn from the benefits she claims.

Millikan v. Guilford Mills, Inc.

Reversed and remanded.

Judges WELLS and HILL concur.

LLOYD E. MILLIKAN v. GUILFORD MILLS, INC., RANSONE & SON PLUMBING, INC., DAVID C. MURRAY, INDIVIDUALLY AND T/A MURRAY CRANE SERVICE AND ROBERT H. RANSONE, INDIVIDUALLY AND T/A AND D/B/A RANSONE & SON PLUMBING

No. 8318SC1077

(Filed 16 October 1984)

1. Negligence § 30— evidence insufficient—directed verdict for defendant proper

Although plaintiff's evidence tended to show that plaintiff was injured because one of the hooking rings by which a pump assembly was being lifted failed, directed verdict was correctly entered for defendants because plaintiff's evidence did not show that anyone was negligent in using the hooking rings to lift the assembly.

2. Evidence § 15— instruction manual—relevant—no prejudice from exclusion

In an action for negligence resulting from a pump assembly falling on plaintiff, there was no prejudice from the exclusion of the pump manufacturer's instruction manual because it contained no information about lifting the motor, the pump, or assembly, or about the purpose of the hooking rings.

3. Evidence § 33.2— hearsay—answers to interrogatories by third party—inadmissible

A third party's sworn answers to interrogatories were inadmissible as hearsay and were properly excluded.

APPEAL by plaintiff from *Morgan, Judge*. Judgment entered 25 February 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 August 1984.

Plaintiff sued the several defendants for damages allegedly sustained due to their negligence when a sump pump and motor weighing more than 800 pounds, which was being lifted by a crane, fell on and injured him. Before trial plaintiff's claims against the manufacturer and distributor of the sump pump, Crane Company and Kester Machinery Company, were dismissed by summary judgment, as was the third party claim of a defendant against Gould, Inc., the manufacturer of the electric motor,

Millikan v. Guilford Mills, Inc.

and none of these parties are interested in this appeal. At trial the claims against the other defendants, Guilford Mills, Inc., which owned the pump assembly and the premises it was situated upon, Robert H. Ransone, individually and doing business as Ransone & Son Plumbing, who installed the pump earlier and participated in its removal, and David C. Murray, individually and trading as Murray Crane Service, who operated and furnished the crane involved, were dismissed by a directed verdict at the close of plaintiff's evidence.

Benjamin D. Haines for plaintiff appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by G. Marlin Evans, for defendant appellee Guilford Mills, Inc.

Tuggle, Duggins, Meschan & Elrod, by Joseph F. Brotherton, for defendant appellee Robert H. Ransone, Individually and t/a and d/b/a Ransone & Son Plumbing.

Henson & Henson, by Perry C. Henson and Jack B. Bayliss, Jr., for defendant appellee David C. Murray, Individually and t/a Murray Crane Service.

PHILLIPS, Judge.

The central and primary question raised by this appeal is whether the evidence presented by plaintiff at trial made out a case of negligence against any of the defendants that were still in the case. The evidence, viewed in its most favorable light for the plaintiff, was to the following effect:

During the spring of 1978 plaintiff was superintendent of construction for JMD Contractors, which concern was constructing some sludge drying beds for the defendant Guilford Mills, Inc. at its facility in Duplin County near Kenansville. That project included the installation of two sump pump assemblies, each consisting of a pump that weighed 680 pounds and a motor that weighed 125 pounds, which had been delivered to Guilford Mills, the purchaser, unassembled. Each motor had two hooking rings on it, one on each side; each ring was about 6 inches long in its hooked shape, about $\frac{1}{2}$ inch wide, $\frac{1}{2}$ inch thick, and was affixed to the motor with two bolts or screws. The installation of the pumps into pits prepared for that purpose was subcontracted to the de-

Millikan v. Guilford Mills, Inc.

fendant Ransone, a plumbing contractor. In April 1978, Ransone took the pumps and motors out of their crates, carried them to the site, and with the aid of a backhoe lowered them into the pits, where the motors were attached to the pumps. In June 1978, because of some unusual noise and vibration in one of the sump pump assemblies, Guilford Mills' project engineer asked defendant Ransone to remove the assembly from its pit so that it could be inspected, and arranged for defendant Murray Crane Service to provide a crane and crane operator to do the necessary lifting. On 6 June 1978, plaintiff, who did not know of the problem and had no responsibilities in connection with it, saw the crane in position near the sump pump pits and saw Ransone hook the choker cable of the crane to the two hooking rings on the side of the motor and place it into the big hook at the end of the cable. Since Ransone had no one assisting him, plaintiff went forward to help as needed. As the pump was being lifted out of the pit defendant Ransone and plaintiff Millikan were sort of steering the impeller and letting it slide through their hands, not putting any pressure on it or anything like that, but just guiding it through the opening. During the lift, Ransone gave hand signals to the crane operator, whose seat in the cab was at least twelve feet from the pump. At all times when plaintiff saw him the crane operator was in the cab of the crane. When the pump assembly had been lifted several feet into the air, one of the metal hooking rings straightened out and the pump fell and struck plaintiff.

Before the lifting operations began Ransone made no inquiry of Guilford Mills or anyone else as to the weight or dimensions of the pump and motor, or the existence of a manufacturer's instruction manual, and did not disengage the coupling between the motor and the shaft and did not remove the motor from the frame. He did not give the lifting operation a whole lot of thought, since he did not feel that it was his responsibility, but he did regard any lifting by a crane as a potentially hazardous operation. He never paid any attention to or considered the weight of the entire pump assembly at any time, and did not inquire about an instruction manual because he didn't think he needed one. Because of his prior experience in selling and installing pumps as a licensed plumber, Ransone did not feel that he needed any instructions in connection with the assembly, installation, or removal of the pump. He identified Plaintiff's Exhibit 1 as being a manufactur-

Millikan v. Guilford Mills, Inc.

er's instruction manual for the assembly involved. He had seen and was familiar with similar manuals. Before the lifting began Ransone had no discussion with the crane operator because he felt that his only responsibility was to repair the pump and that others were responsible for lifting it; but he admitted that neither plaintiff nor anyone else gave him any instructions during the lifting process. He did not know that the purpose of the hooking rings on the side of the motor was to lift the motor only, and assumed that the cables attached to the crane would lift the entire pump assembly by the use of the hooking rings on the motor. He thought the hooking rings were for lifting the entire pump assembly, but stated prudence would probably require that you find this out before beginning the lifting. He did not use a sling or spreader bar to help lift the pump mechanism out of the pit, and had never used a spreader or lifting bar in any lifting operations he had been involved in as a plumber. The pump was the largest one Ransone had ever been involved with, either installing, disassembling, or removing. Neither the crane operator nor the crane company knew the weight of the pump and motor that was going to be lifted or made any inquiry about it, and neither had lifted or raised a pump of that type before.

From the foregoing evidence it is readily inferable that what caused the sump pump assembly to fall on plaintiff was the straightening out of one of the two hooking rings that the entire assembly was being lifted by. Other questions remain, however. One is what caused the hooking ring to fail? Plaintiff argues, perhaps correctly, that common sense inevitably leads to the conclusion that the hooking ring failed because the 805 pound pump assembly was simply too heavy for it. Even so, was this because of the weakness of that particular ring—the other ring did not bend or straighten—or because such rings were not supposed to be used in lifting the entire assembly? The evidence presented gives us no answer. But assuming *arguendo*, as plaintiff contends, that rings of that type can be expected to fail when used to lift an 800 pound weight, did Ransone or any other defendant know, or should any of them have known, that? Plaintiff strongly argues that this should have been known, because the rings “were designed only to lift the pump motor which weighed 125 pounds.” But the evidence does not show that. No one testified that the rings were designed to lift only the motor; or that it is customary

Millikan v. Gullford Mills, Inc.

or proper to lift such assemblies by some other means; or that hooks of the size and substance involved were not strong enough to support both the 125 pound motor and the 680 pound sump pump assembly. That the hooks involved were situated on the lighter motor, rather than on the much heavier pump, is not enough by itself, in our opinion, to prove that they were not designed to be used in lifting the entire assembly. For the two units to function they had to be joined together and after being put in operation before they could be inspected or repaired in certain respects they had to be moved from the pit in which they were installed. It cannot just be assumed that there were better and safer ways of lifting the unified assembly which should have been used or that the units should have been separated before they were lifted. Nor, in our opinion, can negligence in lifting the assembly by the rings with a crane be inferred from the fact that the units were separate when Ransone installed the heavy pump with the aid of a backhoe and installed the lighter motor manually. From aught that the evidence shows removing the sump pump assembly could have required procedures and equipment different from those used in installing it. The evidence does tend to show, we believe, that Ransone was negligent in using the hooking rings to lift the entire assembly without first verifying that was what they were designed for. He admitted that he did not know that the rings were designed for that purpose, only assumed that they were, and that it was imprudent on his part not to find out before beginning the lift; and imprudent conduct is some evidence of negligence. But the evidence also fails to show what Ransone would have learned if he had investigated the matter; so the proximate connection between his imprudence or negligence and the straightening of the hook and plaintiff's injury was not established.

[1] Rarely is it proper to direct a verdict against a plaintiff in a negligence case. *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E. 2d 535 (1981). This is because of the favorable view that must be taken of the plaintiff's evidence in such cases, the prerogative that juries have in all cases to believe all, none, or some of the evidence presented to them, and what is reasonably prudent conduct under varying circumstances is nearly always a question of fact, rather than law. Thus, to survive a motion for directed verdict in such a case, the plaintiff's evidence tending to show a

Millikan v. Guilford Mills, Inc.

defendant's negligence does not have to be either strong, convincing, consistent, or even credible to anyone except the jury; it is enough if the evidence favorable to plaintiff, when pieced together, is sufficient, along with the inferences reasonably drawable therefrom, to warrant finding that plaintiff was injured as a proximate result of the defendant's negligence. Thus, under our law, close cases, dubious cases, questionable cases, and even weak cases are still cases for the jury; but cases in which the evidence fails to establish one or more of their essential elements are not. Quite clearly, we think, plaintiff's evidence, even when viewed as indulgently as the law permits, is not sufficient to warrant the conclusion that he was injured as a result of the negligence of any of the defendants. Though the evidence does tend to show that plaintiff was injured because one of the hooking rings that the 805 pound assembly was being lifted by failed, it does not tend to show that using the hooking rings to lift the assembly was negligence on the part of anyone. Since the plaintiff's evidence is clearly deficient in this essential respect, the directed verdict in favor of all the defendant appellees was correctly entered. Under the circumstances, the contentions of the defendants Guilford Mills and Murray Crane Service that plaintiff's evidence also failed to show that either of them was responsible, either directly or indirectly, for the assembly being lifted by the rings need not be considered. One basis for dismissing an action is enough.

[2] Plaintiff also contends that the court erred to his prejudice by refusing to receive into evidence the pump assembly manufacturer's instruction manual, which plaintiff offered against Guilford Mills and Ransone. The basis for refusing this evidence, apparently, was that the manual was a private publication not having the force of law. *Sloan v. Carolina Power and Light Co.*, 248 N.C. 125, 102 S.E. 2d 822 (1958). But the manual was not offered as a legal code binding upon the parties; it was offered, apparently, simply as some evidence as to how such assemblies are customarily handled. The use of and reliance upon instruction manuals for machines, devices and equipment of all kinds is so nearly universal and well known that courts should receive such materials into evidence as a matter of course in appropriate cases. It is a matter of common knowledge that there is hardly a machine, device, or piece of equipment sold in this country that is not accompanied by an instruction manual, sheet, or label of some kind. The publica-

Millikan v. Guilford Mills, Inc.

tion and distribution of such information is encouraged, if not required, by innumerable government agencies, consumer groups and industry associations; and the failure of manufacturers and distributors to properly inform purchasers and other users of a product's hazards, uses, and misuses is a basis for rendering them legally liable for injuries resulting therefrom under some circumstances. 72 C.J.S. Supp. *Products Liability* § 29 (1975). That people who acquire or use such machines and devices usually read and follow the accompanying information is also a matter of common knowledge, confirmed by the rule of law which declares that the failure to do so is evidence of contributory negligence under some circumstances. W. Prosser, *Law of Torts*, § 102 (4th ed. 1971). That such manuals are usually reliable is generally known, and when relevant and material should be received, we think, as some evidence of what is customarily done by users of such products. 1 Brandis N.C. Evidence § 165 (1982). But the court's refusal to receive the manual involved here did plaintiff no prejudice, because it contains no information about lifting the motor, the pump, or assembly, or the purpose of the hooking rings. Thus, even if it had been received into evidence, the critical gaps in plaintiff's case would still be there.

[3] But some material information about lifting electrical motors and their assemblies was contained in some other material that plaintiff unsuccessfully offered into evidence. The offering consisted of some interrogatories that plaintiff served on Gould, Inc., the manufacturer of the electric motor, when that third party defendant was still in the case, Gould's sworn answers thereto, and a pamphlet issued by the National Electrical Manufacturers Association that was attached as an exhibit. The court's refusal to receive this material into evidence was proper. Even if Gould had still been in the case its *ex parte* statements would not have been admissible against the defendants. *Barclays American Financial, Inc. v. Haywood*, 65 N.C. App. 387, 308 S.E. 2d 921 (1983). If the officer of Gould that signed the answers had undertaken to testify to the same effect, the question presented would be different; but he was not present, and with regard to the defendant appellees his out of court statements were but inadmissible hearsay.

State v. McLamb

Affirmed.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. THOMAS LATTIE McLAMB AND SHIRLEY LANG McLAMB

No. 8411SC11

(Filed 16 October 1984)

1. Criminal Law § 85.2— character witness—cross-examination about prior pleas by defendants

In a prosecution for possession of marijuana with intent to sell, defendants were not prejudiced when the trial court permitted the prosecution to cross-examine defendants' character witness as to knowledge of defendants' guilty pleas in prior marijuana cases since defense counsel introduced the subject of defendants' reputation for illegal activity, the character witness admitted on direct examination that he had heard "little things" about defendants, and the prosecution thus could inquire into the witness's assertion that he was not aware of any illegal activity by defendants and into the apparent contradiction in his testimony about defendants' general reputation in the community.

2. Searches and Seizures § 44— motion to suppress evidence—court's order not inconsistent

The court's order in a suppression hearing was not inconsistent in finding that an affidavit provided probable cause for issuance of a warrant for the search of defendants' house but failed to provide probable cause for a search of the surrounding six-acre tract of land.

3. Searches and Seizures § 23— warrant to search tract of land—sufficiency of affidavit

An affidavit gave a sufficiently detailed description of illegal activities and contraband expected to be found on a six-acre tract of land to support a conclusion that there was probable cause to believe that the entire tract was used in the drug business and the issuance of a warrant to search the tract.

4. Searches and Seizures § 39— warrant for tract of land—search of vehicle not on tract

The scope of a warrant to search a six-acre tract of land was not exceeded by the search of a vehicle not parked on the tract where the vehicle was parked across the road from and appeared to be connected with a house and trailers which were expressly mentioned in the search warrants.

State v. McLamb

5. Searches and Seizures § 1— apparently abandoned vehicles— no expectation of privacy

Even if vehicles were located on land owned or possessed by defendants, defendants could have no reasonable expectation of privacy as to the vehicles where they were in rough, grassy, undeveloped areas and appeared to be abandoned.

6. Criminal Law § 114.3— no expression of opinion in instructions

The trial judge did not express an opinion on the evidence when he used an example similar to the facts of the case in explaining to the jury the difference between actual and constructive possession of marijuana.

7. Criminal Law § 99.4— no expression of opinion by trial court

The trial court did not express an opinion in seeking to prevent defense counsel from eliciting mere guesses from a witness.

8. Narcotics § 3.1— competency of evidence in marijuana case

In a prosecution for possession of marijuana with intent to sell, evidence of the marijuana, currency and income tax returns was relevant on the questions of whether defendants had constructive possession of the marijuana and whether they were running a drug business.

9. Narcotics § 3.1— behavior of drug-sniffing dogs—foundation for testimony

The State laid an ample foundation for testimony as to the behavior of drug-sniffing dogs in a prosecution for possession of marijuana with intent to sell.

APPEAL by defendants from *Bailey, Judge*. Judgment entered 12 October 1983 in Superior Court, HARNETT County. Heard in the Court of Appeals 20 September 1984.

The defendants, Thomas and Shirley McLamb, were tried at the 10 October 1983 Session of Harnett County Superior Court on charges of possession of a controlled substance with intent to sell. The State presented evidence which tended to show that on 29 November 1982 a team of law enforcement officers searched the defendants' residence, the six-acre tract of land surrounding it, and two motor vehicles on or near the land. The officers possessed a search warrant. They found large amounts of currency, marijuana seeds, and business documents within the defendants' home. They also found sacks of marijuana in a pickup truck and in a 1968 Oldsmobile on or near the tract of land. These motor vehicles were shown to have been registered in Shirley Lang McLamb's name.

The defendants, although they did not take the stand, presented evidence that they did not own the six-acre tract of land.

State v. McLamb

They also showed that Shirley McLamb had tried to sell the Oldsmobile by bill of sale dated 8 April 1982. Finally, they presented evidence that various people in the community had access to the freezer in their home, which contained the marijuana seeds.

The defendants were both found guilty of possession of a controlled substance with intent to sell, and were both sentenced to five years in prison. From the judgments against them, they appeal.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Perry W. Martin and Donnie R. Taylor, for defendant appellants.

ARNOLD, Judge.

[1] The defendants first contend that the trial court erred in allowing the State to cross-examine the defendants' character witness as to knowledge of the defendants' prior similar acts and in denying the defendants' motion for mistrial based on the cross-examination. It is well-established in North Carolina that a character witness may not be asked whether he has heard of particular acts of misconduct by the defendant. *See State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975). The concern of this rule is that such questioning, which informs the jury that a defendant has a prior criminal record, introduces innumerable collateral issues and requires a defendant not only to defend his behavior in the case at bar, but over the course of a lifetime. *See State v. Robinson*, 226 N.C. 95, 96, 36 S.E. 2d 655, 656 (1946). It places too great a burden on the defendant and is prejudicial, especially when the defendant has chosen not to testify. In the case at bar, the defendants chose not to testify, and the prosecutor asked a character witness, Mr. Mauney, whether he was aware that the defendants had pled guilty to drug violations. Such cross-examination would ordinarily be improper and provide grounds for a new trial.

In the present case, however, the defense counsel introduced the subject of whether the defendants had been involved in prior criminal activity. On direct examination the defense counsel asked Mr. Mauney whether he had seen any illegal activity at the de-

State v. McLamb

endants' home. He replied "no." Then the defense counsel asked Mr. Mauney what he knew of the defendant Tom McLamb's general reputation in the community. He responded that, "*Well, you hear a little and know a little*, but what I know I don't know anything about other than what Tom shared with me about his life when he came to the church and got saved and wanted to get his life straightened out." (Emphasis added.) The State then questioned Mr. Mauney as to whether he knew of Mr. McLamb's guilty pleas in two previous marijuana cases. He replied that he knew nothing of McLamb's guilt. The State asked Mauney whether he knew that Shirley McLamb had pled guilty to a drug violation. Because of defense objections and an exchange with the trial court, Mauney apparently did not respond. The State then asked, "Now, Mr. Mauney, in response to Mr. Stewart's question, you said there were little things you had heard around—." Mauney responded, "You hear a lot of things about a lot of people, I don't pay any attention to them." Mauney later said he had heard nothing about Tom McLamb.

The defense counsel thus broached the subject of the McLamb's reputation for illegal activity. Further, Mauney admitted on direct examination that he had heard "little things" about the McLambs, implying that their reputation in the community actually was not good. The prosecution thus could inquire into the witness's assertion that he was not aware of any illegal activity, and into the apparent contradiction in his remarks about the defendants' general reputation in the community. See *State v. Harris*, 49 N.C. App. 452, 271 S.E. 2d 579 (1980). In view of the totality of the circumstances, we do not believe that the prosecution's reference, in the course of this inquiry, to specific prior illegal acts by the defendants so prejudiced them that they were entitled to a new trial.

[2] The defendants contend further that the pretrial order of Judge Russell G. Walker, Jr., on 3 October 1983, concerning the defendants' motion to suppress evidence seized in the search of 29 November 1982, was in error. Defendants argue that the judge's conclusion that a warrant to search the entire six-acre tract was "impermissibly broad" was inconsistent with his ruling that any evidence seized from the McLamb house could be introduced as evidence at trial. Defendant misinterprets the order. Judge Walker found sufficient facts in the affidavit to provide probable

State v. McLamb

cause to warrant search of the McLamb house and one of the four trailers on the six-acre tract of land. He did not find sufficient facts in the affidavit to justify search of the *entire* tract, and left the question of the search of the Oldsmobile to the trial judge. That Judge Walker found certain allegations in the warrant insufficient to support a search warrant for the whole tract does not mean that other allegations in the warrant did not support the search of the McLamb residence.

Defendants contend further that Judge Bailey erred in denying the motion at trial to suppress evidence seized from the Oldsmobile and Ford truck parked on or near the six-acre tract. The defendants argue that the Oldsmobile was not located on the six-acre tract, and that, even so, the six-acre tract was not owned by the defendants. We observe that if the defendants did not own or possess the vehicles or the land where they were located then it is likely that they had no expectation of privacy regarding them and accordingly had no standing to contest the search and seizure of marijuana found in them. The Fourth Amendment right against unreasonable searches and seizures is personal and cannot be asserted by or on behalf of others. *See State v. Mettrick*, 54 N.C. App. 1, 11, 283 S.E. 2d 139, 145 (1981), *aff'd*, 305 N.C. 383, 289 S.E. 2d 354 (1982).

[3, 4] We find, however, that the affidavit gave a sufficiently detailed description of illegal activities and contraband expected to be found on the six-acre tract for Judge Bailey to conclude that there was probable cause to believe that the entire tract was used in the drug business. The fact that the Oldsmobile was parked across the road from the trailers, technically fifteen feet from the McLamb property line which ran down the center of the road, does not render search of it illegal. It appeared to be connected with the trailers or the McLamb house, which were expressly mentioned in the search warrant. It was parked on a grassy area at the side of the road. On the other side of it was a fence, and then a cultivated field. No residences, aside from the McLamb house and the four trailers, were in the vicinity. Search of the vehicles did not exceed the scope of the warrant. *See State v. Travatello*, 24 N.C. App. 511, 211 S.E. 2d 467 (1975); *State v. Logan*, 27 N.C. App. 150, 218 S.E. 2d 213 (1975).

State v. McLamb

[5] Even if the warrant applied only to the McLamb house and the Melton trailer, and the two vehicles were found to be too far from them to be within their "curtilage," we observe that since the vehicles were in rough, grassy undeveloped areas and appeared to be abandoned, the McLamb could have had no reasonable expectation of privacy as to them. *See Oliver v. United States*, --- U.S. ---, 80 L.Ed. 2d 214, 104 S.Ct. --- (1984). This could be true even if the vehicles were located on land owned or possessed by the McLamb.

[6] We reject the defendants' contention that the trial judge expressed opinions which prejudiced them, and so denied them a fair trial. Judge Bailey's interjections when the defense counsel was cross-examining a State's witness, and when the State was cross-examining a defense character witness, were intended to maintain the progress of a prolonged trial. *See State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684 (1978). Further, the judge's use of a hypothetical in the charge, somewhat similar to the facts of this case, did not, in light of the rest of his remarks, reflect his opinion as to the facts of the case. The judge, in explaining the difference between actual and constructive possession, said:

As an example, if I have a handful of marijuana in my hand, I have actual possession of it. On the other hand, if I have it locked in my automobile out in the parking lot, I have constructive possession of it, or may have.

We are not convinced that this was an expression of opinion or that, if it was, there is a reasonable possibility that if the judge had not used "automobile" but, rather, had used "tractor" or "van," or "shed," the jury would have reached a different result. We do not find that defendants were prejudiced by the judge's explanation of the law of possession.

[7] The defendants contend that the trial judge's failure to rule on objections also indicated an opinion and denied the defendants their right to effective assistance of counsel. The trial judge sustained objections to repeated requests by defense counsel of a witness to estimate the distance between the Oldsmobile and the mobile homes, when the witness stated he had taken no measurements and could not give an accurate opinion on the distance. The trial judge merely sought to prevent the defense from eliciting mere guesses from the witness, and sought also to maintain the

State v. McLamb

progress of the trial. We do not believe that this reflected an opinion or that the defendants were rendered ineffective assistance of counsel by the judge's actions.

We reach finally the defendants' contention that the judge erred in his charge to the jury. They contend first that he did not instruct the jury properly on the question of ownership of the Oldsmobile. Yet, the judge stated:

That at some time before this search a bill of sale had been executed conveying the Oldsmobile car to one Frazier, who is said to live in Richmond, Virginia. There was no transfer of title in the State of North Carolina, the title remained in the name of Shirley Lang McLamb.

Since Ms. McLamb had not assigned a certificate of title, and no application for a new title had been made, title indeed had not passed, *see Nationwide Mutual Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E. 2d 511 (1970), and the judge's instructions were correct.

The judge's instructions on ownership and possession were adequate for purposes of the evidence presented.

The defendants' contention that the trial judge failed to instruct on simple possession of marijuana as well as on possession with intent to sell has no merit. The record indicates that the judge did explain both crimes and the circumstances in which the jury could find them to have occurred.

[8] The court's admission of the marijuana, currency, and income tax returns was relevant to the questions of whether defendants had constructive possession of the marijuana and of whether they were running a drug business. The State presented sufficient evidence to take the case to the jury. The trial court properly denied defendants' motion to dismiss at the close of all the evidence.

[9] The State laid an ample foundation for testimony as to the behavior of drug-sniffing dogs. We have had no need to reach the constitutional question of the use of such dogs in searches, although we observe that in a case such as this, the use of the dogs in open fields and around abandoned vehicles was not so intrusive as to bring the Fourth Amendment into play.

Cator v. Cator

No error.

Judges WELLS and HILL concur.

PATRICK WALLACE CATOR v. DOLORES JEAN PETTET CATOR

No. 8329DC1169

(Filed 16 October 1984)

1. Divorce and Alimony § 21.6— separation agreement—acceptance of late payments not a waiver of nonpayment

A wife's acceptance of late payments in some months does not waive her right, under the terms of the separation agreement, to bring an action for alimony based on nonpayment in other months.

2. Divorce and Alimony § 21.6— separation agreement—material breach not found

When a husband's failure to make alimony payments occurred simultaneously with hearings on a motion for summary judgment, and where the husband performed intermittently during that time and there was no evidence that he was attempting to avoid his obligation, there was not a substantial failure to perform amounting to a material breach of the separation agreement. The alimony provision of the agreement was carried out and the separation agreement was still binding.

APPEAL by defendant from *Guice, Judge*. Judgment entered 7 July 1983 in District Court, HENDERSON County. Heard in the Court of Appeals 29 August 1984.

Blanchard & Thompson, by Thomas D. Thompson, for plaintiff appellee Patrick Wallace Cator.

James H. Toms, P.A., by James H. Toms, for defendant appellant Dolores Jean Pettet Cator.

BECTON, Judge.

This case involves the binding effect of a separation agreement, in light of late alimony payments and nonpayments. On 10 April 1981, the plaintiff husband, Patrick Wallace Cator, and the defendant wife, Dolores Jean Pettet Cator, entered into a separation agreement. The Equitable Distribution Act (the Act), as codified at N.C. Gen. Stat. Sec. 50-20 (Supp. 1983), was thereafter

Cator v. Cator

enacted. The Act applies to all actions for absolute divorce instituted on or after 1 October 1981. The husband filed an action for absolute divorce on 20 April 1982. However, the Act does not purport to modify existing separation agreements. It provides:

Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

G.S. Sec. 50-20(d) (Supp. 1983).

In June 1982, the husband amended his Complaint to ask the trial court to incorporate the April 1981 separation agreement by reference into the divorce judgment. The wife, in her Answer, denied that the separation agreement was a complete settlement of the parties' marital obligations and property; she counterclaimed for temporary and permanent alimony, equitable distribution of the parties' property and attorney's fees. On 22 July 1982, the trial court granted the parties an absolute divorce but did not rule on the wife's counterclaim. The separation agreement was not incorporated by reference into the divorce judgment. On 1 December 1982 the husband moved for summary judgment on the wife's counterclaim, asserting the separation agreement in bar. At the hearings on the motion in March and June 1983, the wife argued, as a separate ground, that the husband's breach of the separation agreement entitled her to bring an action for alimony. The husband failed to make three of the six monthly alimony payments due under the terms of the separation agreement between January and June 1983.

From summary judgment in favor of the husband, the wife appeals.

I

The wife contends that the trial court erred in concluding that (1) the wife waived her right to bring an action for breach of the separation agreement by previously accepting late payments; (2) the husband had not failed to make alimony payments; (3) the

Cator v. Cator

husband's actions did not constitute a material breach; and (4) the separation agreement was still binding on the parties.

Although the record does not support some of the trial court's findings, we, nevertheless, affirm summary judgment in favor of the husband for the reasons stated below, especially since the trial court was not required to make findings on the summary judgment motion.

II

WAIVER AND NONPAYMENT

[1] Under the terms of the April 1981 separation agreement, the husband agreed to pay the wife \$200 per month in alimony "on or before the 5th day of each month . . ." The husband made all payments due until January 1983. Some of the payments were up to two weeks late, but the wife accepted them. From the parties' testimony at the hearings on the motion for summary judgment held in March and June 1983, it is uncontroverted that the husband did not make the January, March and June 1983 payments.

At summary judgment the trial court concluded that, by routinely accepting late alimony payments, the wife had waived her right to bring an action for alimony, based on a breach of the separation agreement. The trial court found as fact that the husband had made all the required monthly alimony payments, albeit late. However, as indicated, the record, including the parties' testimony, does not support the finding that the husband made *all* the payments. Since a trial court need not make findings of fact in deciding a motion for summary judgment, we may disregard them on appeal. *Mosley v. Nat'l Finance Co.*, 36 N.C. App. 109, 243 S.E. 2d 145, *disc. rev. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978).

The doctrine of waiver applies to separation agreements. *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E. 2d 763 (1980). Under the terms of the separation agreement,

if the said Husband fails to make the monthly payments of alimony as herein specified, . . . the said Wife shall have a right to bring an action against him for alimony and any income he has including his retirement income shall be subject to garnishment.

Cator v. Cator

Arguably, the wife did waive her right to enforce the alimony provision requiring payment "on or before the 5th day of each month," when she often accepted payments up to two weeks late. However, there is a distinction to be drawn between late payment and nonpayment; each represents a breach of a separate contractual obligation. A waiver of the exact time of performance does not excuse the performance itself. We conclude that the wife's acceptance of late payments does not waive her right, under the terms of the agreement, to bring an action for alimony based on nonpayment.

The husband's reliance on *Wheeler* is misplaced. In *Wheeler* the husband paid alimony to his wife, although the wife only partially performed the child visitation provisions of their separation agreement. When the wife brought an action for back alimony, the husband attempted to assert her breach in defense. The *Wheeler* Court held that by continuing to accept his wife's partial performance, and continuing to perform his alimony obligation over a period of time, the husband had waived his right to assert his wife's breach.

The wife, in the case *sub judice*, did not continue to accept the husband's partial performance of the monthly payment obligation. After the husband first failed to pay in January 1983, she did not cash any of the subsequent checks.

The wife did not waive her right to bring an action for alimony, based on a breach of the separation agreement.

III

MATERIAL BREACH

[2] The wife's right to rescind the alimony provision of the separation agreement and bring an action for alimony is governed by the law of contracts, *Rose v. Rose*, 66 N.C. App. 161, 310 S.E. 2d 626 (1984), which does not generally require strict performance. We recognize the equitable doctrine of substantial performance, allowing a party to recover on a contract although she has not literally complied with its provisions. *Black v. Clark*, 36 N.C. App. 191, 243 S.E. 2d 808 (1978); see 17 Am. Jur. 2d *Contracts* Secs. 375-78 (1964). By the same token, rescission of a separation agreement requires proof of a material breach—a substantial failure to perform. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E. 2d 240

Cator v. Cator

(1964); 17 Am. Jur. 2d *Contracts* Sec. 504 (1964). We conclude that the wife has failed to show a material breach.

The wife relies on *Harris v. Harris*, 58 N.C. App. 314, 293 S.E. 2d 602 (1982) for the proposition that she need not prove a material breach. However, in *Harris*, the materiality of the breach was obvious. The Harris' separation agreement included a clause permitting the wife to rescind the agreement and maintain an action for alimony, if the husband breached any provision of the agreement. The husband made the full monthly child support payment only once in one and one-half years. This Court affirmed the trial court's conclusion that the husband's breach of the child support provision of the separation agreement entitled the wife to bring an action for alimony.

We turn to the provisions of the April 1981 separation agreement. Because a separation agreement is a contract, we apply the same rules used to interpret any other contract. *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973). When the agreement is in writing and unambiguous, its meaning and effect is a question of law for the court. *Id.* In the fifth paragraph, the separation agreement expressly grants the wife the right to bring an action for alimony "if the . . . Husband fails to make the monthly payments of alimony as herein specified. . . ." Therefore, the alimony provision could be rescinded independently of the rest of the agreement, which provided for the distribution of real and personal property, payment of medical, dental and hospital bills and charge accounts.

We must determine whether there has been a substantial failure to perform or a mere lapse of performance with regard to the alimony provision. See 1 A. Lindey, *Separation Agreements and Ante-Nuptial Contracts* Sec. 25, at 25-12 (1984) (hereinafter cited as Lindey). Husband made all payments from May 1981 until January 1983. The first nonpayment occurred after he had moved for summary judgment on the wife's counterclaim, alleging that the separation agreement was invalid. As of the first hearing on the summary judgment motion in March 1983, the husband was one month in default. His February, April and May payments show a continued willingness to perform. See 1A Lindey, *supra*. The wife did not cash those checks; as a result, the husband stopped payment on them, but kept the money in his account.

Cator v. Cator

There is no evidence that the husband is attempting to avoid his obligation. When asked at the June hearing why he did not make the June payment, the husband replied,

Because I had three outstanding checks that had not been cashed and I had went ahead and stopped payment on them.

We do not know whether or not . . . we're down here to find out whether I owe any money or not. If there is no contract, I don't owe any money. If there is, then, yes, I owe her money, and that's what we're trying to decide.

Considering that husband's breaches occurred simultaneously with the hearings on the motion for summary judgment and that husband performed intermittently during that time, we find no substantial failure to perform. Since the wife has not proven a material breach, the alimony provision of the separation agreement remains in effect.

IV

BINDING EFFECT OF SEPARATION AGREEMENT

The trial court concluded that the separation agreement was a "final and complete settlement of the property and marital interest" between the parties, binding upon the wife.

On appeal, the wife argues that the agreement is no longer binding on her because of the husband's failure to pay alimony. According to the wife, paragraph 12 of the agreement entitles her to bring an action for alimony. Paragraph 12 reads, in pertinent part, as follows:

[E]ach party hereto except for the matters and things herein mentioned hereby waives his or her right over any property or income of the other . . . provided the provisions of this agreement are carried out.

For the reasons stated in III, *supra*, we conclude that the alimony provision of the separation agreement, the only contested provision, has been carried out. Therefore, the separation agreement is still binding on the parties.

Morgan v. Town of Hertford

Affirmed.

Judges HILL and BRASWELL concur.

THOMAS S. MORGAN, TOWN OF WINFALL AND ALBEMARLE ELECTRIC
MEMBERSHIP CORPORATION v. TOWN OF HERTFORD

No. 831SC1227

(Filed 16 October 1984)

1. Electricity § 2.1; Municipal Corporations § 4.4.— furnishing of electrical service by one municipality in area annexed by another

The rights of a municipality competing to provide electric service within the corporate limits of another municipality are determined by G.S. 160A-331 through 338, under which a municipal corporation may be a "person" and a "secondary supplier."

2. Electricity § 2.1; Municipal Corporations § 4.4— competing electric service corporations

Where defendant was the sole provider of electric service in the annexed area, where both plaintiff and defendant had the willingness to serve and appeared to have the financial and physical ability to serve, but plaintiff was not ready to serve, defendant's continued service fell within the reasonable limitations permitted by G.S. 160A-312, and defendant was properly declared a secondary supplier.

APPEAL by plaintiffs from *Strickland, Judge*. Order and judgment entered 12 August 1983 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 20 September 1984.

Crisp, Davis, Schwentker & Page, by William T. Crisp and Robert F. Page, for plaintiff appellants.

Lake and Lake, by I. Beverly Lake, Jr., for defendant appellee.

BECTON, Judge.

This case involves the rights of a municipality to continue providing electric service within an area recently annexed by a neighboring municipality and potentially serviced by a franchised electric membership corporation.

Morgan v. Town of Hertford

Until September 1962, the defendant, Town of Hertford, a municipal corporation created and existing under the laws of North Carolina, provided electric service to the town of Winfall, also a municipal corporation created and existing under the laws of North Carolina, and to the surrounding area, including all customers in the annexed area in dispute. The area in dispute has never been assigned to a supplier of electric service pursuant to N.C. Gen. Stat. Sec. 62-110.2 (1982). In September 1962, Winfall granted a franchise to plaintiff, Albemarle Electric Membership Corporation (Albemarle), to provide electric service within the corporate limits. Under its terms, the franchise extended to and was automatically effective in any territory subsequently annexed by Winfall. Hertford sold Albemarle its power lines and facilities within the corporate limits of Winfall, but continued to provide service to the surrounding area, including all the residents of the area in dispute. The area in dispute was subsequently annexed to Winfall on 9 March 1981. On 15 January 1982, plaintiff, Thomas S. Morgan, a resident of the annexed area, asked Hertford to disconnect its lines to his house so that Albemarle could run its lines in. Hertford refused his request.

On 11 May 1982 Winfall, Albemarle and Morgan instituted this declaratory judgment action seeking to establish Albemarle's right, as the sole electric franchisee, to provide electric service to Morgan and any other present and future customer within the annexed area, who desired service from Albemarle. Hertford, in its Answer and Counterclaim, asked the trial court to declare that Hertford had the exclusive right to serve all present and future customers within the annexed area. The parties filed cross-motions for summary judgment. The trial court denied the motions, because neither party was entitled to judgment as a matter of law. The trial court then declared Albemarle a "primary supplier" and Hertford a "secondary supplier" within the meaning of N.C. Gen. Stat. Secs. 160A-331 and -332 (1982). Therefore, Hertford has all the rights of a "secondary supplier" provided under G.S. Sec. 160A-332 (1982), including the exclusive right to serve all premises within the annexed area being served by it, or to which any of its facilities were attached, on the date of annexation, 9 March 1981. Albemarle has the rights of a "primary supplier" provided under G.S. Sec. 160A-332 (1982).

Plaintiffs appeal.

Morgan v. Town of Hertford

I

Plaintiffs argue that the trial court erred in declaring Hertford a "secondary supplier," as defined in N.C. Gen. Stat. Sec. 160A-331(5) (1982), and therefore, in denying plaintiffs' motion for summary judgment. We affirm.

II

Hertford's right to provide electric service within the corporate limits of Winfall requires a two-step analysis: (1) Is Hertford a "secondary supplier" under G.S. Sec. 160A-331(5) (1982) and, if so, (2) Does Hertford's proposed operation within the corporate limits of Winfall qualify as "within reasonable limitations," pursuant to N.C. Gen. Stat. Sec. 160A-312 (1982)?

[1] The Territorial Assignment Act of 1965, as codified at N.C. Gen. Stat. Sec. 62-110.2 (1982) and G.S. Secs. 160A-331 to -338 (1982), represents an attempt to eliminate the "uneconomic duplication of transmission and distribution systems" bred of unbridled competition between public utilities, electric membership corporations and municipalities by designating the various competitors' rights. *Domestic Electric Svce, Inc. v. City of Rocky Mount*, 285 N.C. 135, 203 S.E. 2d 838 (1974). We are asked to decide whether G.S. Secs. 160A-331 to -338 (1982), the sole statutes governing electric service within city limits, determine the rights of a municipality competing to provide service within the corporate limits of another municipality. We find that they do.

G.S. Sec. 160A-331 (1982) establishes two categories of competitor—the primary and secondary supplier. A "primary supplier" is defined as

a city that owns and maintains its own electric system, or a person, firm, or corporation that furnishes electric service within a city pursuant to a franchise granted by, or contract with, a city, or that, having furnished service pursuant to a franchise or contract, is continuing to furnish service within a city after the expiration of the franchise or contract.

G.S. Sec. 160A-331(4). Hertford concedes that it is not a "primary supplier" outside its own city limits. *Duke Power Co. v. City of High Point*, 22 N.C. App. 91, 205 S.E. 2d 774, cert. denied, 285 N.C. 661, 207 S.E. 2d 752 (1974) (dicta). A "secondary supplier" is

Morgan v. Town of Hertford

defined, in pertinent part, as a "person, firm, or corporation that furnishes electricity at retail to one or more consumers other than itself within the limits of a city but is not a primary supplier." G.S. Sec. 160A-331(5) (1982).

Plaintiffs assert that "the words 'person, firm or corporation' ordinarily denote a private corporation and not a municipality." The words "person, firm or corporation" are not defined within Chapter 160A; therefore, they are to be given their common and ordinary meaning, nothing else appearing. *In re The Appeal of Clayton-Marcus Co.*, 286 N.C. 215, 210 S.E. 2d 199 (1974). According to Webster's, a "person" is "a human being, a body of persons, or a corporation, partnership, or other legal entity that is recognized by law as the subject of rights and duties." Webster's Third International Dictionary 1686 (1968). There is no distinction drawn between public and private corporations. Significantly, the United States Supreme Court has long held that a municipality is a "person" within the meaning of Section 8 of the Sherman Act, as codified at 15 U.S.C. Sec. 7 (1976) and Sec. 1 of the Clayton Act, as codified at 15 U.S.C. Sec. 12 (1976). *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L.Ed. 2d 364, 98 S.Ct. 1123 (1978). The sections cited above define a "person" to "include corporations . . . existing under or authorized by the laws of . . . any State. . . ." 15 U.S.C. Secs. 7 and 12 (1976). A "corporation" is defined as "a single person or object treated by the law as having a legal individuality or entity other than that of a natural person." Webster's Third New International Dictionary 510 (1968). There is no dispute that Hertford is a municipal corporation. Neither the ordinary definition of "person" nor the ordinary definition of "corporation" excludes public corporations.

Further, we note that a municipality has two persona: it exists as a government agency and as a private corporation. *Clark v. Scheld*, 253 N.C. 732, 117 S.E. 2d 838 (1961); *Millar v. Town of Wilson*, 222 N.C. 340, 23 S.E. 2d 42 (1942). In supplying electricity to a neighboring municipality for profit, a municipality is acting as a private corporation. *Accord City of Lafayette*.

Finally, we find support in the language of N.C. Gen. Stat. Sec. 160A-312 (1982), which provides, in pertinent part: "*Subject to Part 2 of this Article*, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enter-

Morgan v. Town of Hertford

prise outside its corporate limits, within reasonable limitations." (Emphasis added.) A "public enterprise" includes electric service. N.C. Gen. Stat. Sec. 160A-311(1) (1982). Part 2, entitled Electric Service in Urban Areas, contains G.S. Secs. 160A-331 to -338 (1982), the provisions dealing with the rights of primary and secondary suppliers of electric service within city limits. The clear implication is that a municipality operating an electric service within the corporate limits of another municipality is subject to the provisions of G.S. Secs. 160A-331 to -338 (1982).

We are persuaded that Hertford, a municipal corporation, is a "person" or "corporation" within the meaning of G.S. Sec. 160A-331(5) (1982) and, therefore, qualifies as a "secondary supplier."

[2] Next we decide whether Hertford's proposed activities as a "secondary supplier" within Winfall's corporate limits under G.S. Sec. 160A-331 and -332 (1982) exceed Hertford's statutory authority to operate electric systems outside its own corporate limits under G.S. Sec. 160A-312 (1982). See *State ex rel. Utilities Comm'n v. Virginia Electric and Power Co.*, 310 N.C. 302, 311 S.E. 2d 586 (1984); *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 309 S.E. 2d 209 (1983). A municipality has the authority to "acquire, construct, establish, enlarge, improve, maintain, own, and operate" electric systems outside its own corporate limits "within reasonable limitations." G.S. 160A-312 (1982). (Emphasis added.)

As a "secondary supplier," Hertford has the exclusive right to serve all premises in the annexed area, which were served by it, or to which any of its facilities were attached, on the date of annexation, 9 March 1981. G.S. Sec. 160A-332(a)(1) (1982). Moreover, Hertford has either exclusive or competitive rights to serve premises with initial service after 9 March 1981, which were either wholly or partially within 300 feet of its lines on 9 March 1981, depending on the proximity of the primary supplier's and other secondary suppliers' lines on 9 March 1981. G.S. Sec. 160A-332(a)(2)-(6) (1982).

Are Hertford's proposed activities "within reasonable limitations?" "The term "within reasonable limitations" does not refer solely to the territorial extent of the venture but embraces all facts and circumstances which affect the reasonableness of the venture.'" *Domestic Electric Svce, Inc. v. City of Rocky Mount*,

Morgan v. Town of Hertford

285 N.C. 135, 203 S.E. 2d 838, 844 (1974) (quoting *Public Svce Co. v. City of Shelby*, 252 N.C. 816, 823, 115 S.E. 2d 12, 17 (1960)). Recently, in *Lumbee River*, our Supreme Court set out and applied the determinative factors in *Domestic Electric*; "each electric provider's level of current service in the area in question and particularly in the immediate vicinity of the potential customer, and the readiness, willingness, and ability of each to serve the potential customer." 309 N.C. at 738, 309 S.E. 2d at 217 (1983). Applying the above factors to this appeal, we find that Hertford was the sole provider of electric service in the annexed area on the date of annexation. Although Hertford and Albemarle both expressed a willingness to serve and appeared to have the financial and physical ability to serve, as of 9 March 1981, Albemarle was not ready to serve. See *Lumbee River*.

Therefore, we conclude that Hertford's continued service as a "secondary supplier" within Winfall's corporate limits after the date of annexation fell "within reasonable limitations." By granting Hertford the exclusive right to serve past and some future customers, G.S. Secs. 160A-331 and -332 (1982) prevent the unnecessary duplication of electric systems. Hertford's exclusive rights are tempered by N.C. Gen. Stat. Sec. 160A-334 (1982), giving the North Carolina Utilities Commission the authority and jurisdiction to order "any secondary supplier to cease and desist from furnishing electric service" based on inadequate service, high rates, or discriminatory practices.

III

For the reasons stated above, the trial court did not err in declaring Hertford a "secondary supplier" and in denying plaintiffs' motion for summary judgment.

Affirmed.

Judges HEDRICK and PHILLIPS concur.

State v. Lassiter

STATE OF NORTH CAROLINA v. RICHARD WAYNE LASSITER

No. 8422SC118

(Filed 16 October 1984)

1. Criminal Law §§ 77.1, 169.3— denial of guilt by defendant—exclusion of testimony—prejudicial error

The trial court erred in the exclusion of testimony by defendant that he did not commit the robbery in question, and such error was not rendered harmless by defendant's later testimony that he did not take any money from the business allegedly robbed since such testimony was not substantially the same as the excluded testimony.

2. Criminal Law § 66.16— photographic identification— independent origin of in-court identification

Although the evidence did not support the trial court's finding that a robbery victim paid close attention to the robber's facial features, the trial court did not err in concluding that the victim's in-court identification of defendant was of independent origin and not tainted by a pretrial photographic identification where the evidence supported the trial court's further findings that the victim was able to observe the robber in a well-lighted area for five minutes; the victim was able positively to identify defendant in a photographic lineup only a month after the offense occurred; and the description which the victim gave on the day of the robbery matched the general description of the defendant.

APPEAL by defendant from *Walker (Russell G., Jr.)*, Judge. Judgment entered 17 August 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 28 September 1984.

Attorney General Rufus L. Edmisten by Assistant Attorney General Harry H. Harkins, Jr., for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Lorinzo L. Joyner for the defendant appellant.

BRASWELL, Judge.

Shortly before 6:00 p.m. on 9 September 1984 as Charlene Penny was preparing to close Moore's One-Hour Martinizing in Statesville, a bearded man wearing clip-on sunglasses entered the store and asked for the manager. When Penny told him that the manager wasn't there, he ordered Penny to get a bag and put all the store's money in it. After Penny had put \$50 in the bag, the man ordered her to go into the back of the store and remove her clothes. When she attempted to escape, the man grabbed her,

State v. Lassiter

pushed her into the back of the store, struck and kicked her, and ripped her blouse. The man then fled the store.

Ms. Penny telephoned Jimmy and Tim Shumaker who were working a few hundred yards away at Shumaker's Gulf. They arrived a few minutes later along with the police. As Ms. Penny was describing her assailant, the defendant, his wife, and child drove up to the store and asked what had happened. Ms. Penny was describing her assailant at that time and told the police that he "looked kind of like" the man in the car.

The next day defendant came by the store and asked Ms. Penny how she was doing. Because Ms. Penny was very busy, she thanked him for his concern, but didn't pay much attention to his looks. About a month later, Ms. Penny again observed defendant, who lived near the store, walk past the store. He no longer had a beard. The following day she observed the defendant walk by the cleaners several times. She became scared and telephoned the police and told them that she had seen a person who she thought might have robbed her. The police talked with the defendant about the robbery and obtained his driver's license photograph, in which he was pictured with a beard, for use in a photographic lineup. They ordered him not to go near the One-Hour Martinizing. Defendant then went to the store, showed Ms. Penny his picture, denied robbing her, and asked her not to pick his picture out of a lineup. Ms. Penny selected the defendant's picture from the photographic lineup.

At trial, the only evidence linking defendant to the crime was Ms. Penny's identification. The defendant presented detailed alibi and reputation evidence. Defendant was convicted of assault on a female and robbery with a dangerous weapon. From a judgment sentencing him to the mandatory minimum term of 14 years imprisonment, defendant appealed.

[1] Defendant brings forth two questions on appeal. Believing that one of his arguments has merit, we award defendant a new trial. Defendant testified in his own defense. During his testimony the following exchange occurred:

Q. Mr. Lassiter, I'll ask you, did you rob the One-Hour Martinizing on September 9, 1982?

State v. Lassiter

A. No, I did not.

Mr. Morris: Objection.

Court: Sustained.

Mr. Morris: Move to strike the answer.

Court: Members of the Jury, disregard his answer.

It is obvious, and the State in its brief concedes, that these actions of the trial court were erroneous. The State contends, however, that the actions were not prejudicial since later in the examination defendant was able to testify that he did not take any money from the business. We are constrained to disagree.

In support of its contention, the State cites *State v. Colvin*, 297 N.C. 691, 256 S.E. 2d 689 (1979), which states that no prejudice arises when the same or similar testimony to that erroneously excluded is later admitted. Defendant was convicted of robbery with a dangerous weapon under N.C.G.S. 14-87. G.S. 14-87 provides that the offense of robbery with a dangerous weapon is completed if there is an attempt to take personal property by the use of a firearm or other deadly weapon. Thus, defendant's testimony that he took no money is not substantially the same as the excluded testimony. We believe that had the court not erroneously stricken the defendant's denial of guilt, there is a reasonable possibility that a different result would have been reached. See G.S. 15A-1443(a). Defendant is, therefore, entitled to a new trial.

[2] Having determined that the defendant is entitled to a new trial, we now consider whether the trial court erred in allowing Ms. Penny to make an in-court identification of the defendant, as the question will likely arise during defendant's new trial. At trial, the defendant objected to Ms. Penny's in-court identification. The trial court conducted a *voir dire* hearing in which he made the following findings of fact:

- 1) That the defendant, Richard Wayne Lassiter, was present in court, represented by his attorney, William Crosswhite;

- 2) That the State of North Carolina was present in court and represented by Assistant District Attorney, Gene Morris;

State v. Lassiter

3) That on September 9, 1983, Charlene Penny was working alone as a cashier at the One Hour Martinizing location, Statesville, Iredell County, North Carolina;

4) That her working area was enclosed on three sides by glass walls;

5) That at approximately 5:55 p.m. she observed a bearded man walking in front of her work station;

6) That the bearded man entered through a side door and approached her at the cash register;

7) That the bearded man was wearing sunglasses;

8) That the bearded man was in her presence for approximately five minutes;

9) That during this time the bearded man demanded money from the cash register and subsequently assaulted her in the back room of the One Hour Martinizing;

10) That she was in his presence for some five minutes;

11) That she was in his presence in a well lighted area;

12) That she paid close attention to his face and facial features;

13) That only his sunglasses obstructed her view of his face;

14) That some 20 minutes later while she was being interviewed by the Statesville Police, a bearded man who looked like her assailant drove up to the cleaners in a green LTD automobile and inquired as to what had taken place and as to her safety;

15) That on the following day, the same man in the LTD came back to the cleaners and spoke to her;

16) That a photographic lineup presented to Charlene Penny on September 9 did not result in the identification of an assailant;

17) That approximately one month later, Charlene Penny observed a non-bearded man who resembled her assailant walk in front of the dry cleaners and wave to her;

State v. Lassiter

18) That on the following day she saw the same non-bearded man walk by in front of the dry cleaners and called the police;

19) That she gave Detective Zimmerman of the Statesville Police Department a description of the non-bearded man whom she had observed on the last two days;

20) That on the following day she observed a photographic lineup of eight photographs of bearded men;

21) That she identified from that lineup a photograph of the defendant; and

22) That Charlene Penny is positive that the defendant, present in court at this trial, is the man who robbed and assaulted her on September 9, 1982, even though his appearance is changed by the removal of his beard.

The court then concluded as a matter of law that

the identification of the defendant by the State's witness, Charlene Penny, as the man who robbed and assaulted her on September 9, 1982, is based upon her independent recollection of her observations of her assailant at the time of the crime and that the photographic lineup exhibited to Charlene Penny of [sic] 1982 was free of any impermissible suggestive procedure and that the in-court identification by Charlene Penny is neither based on the photographic lineup nor is it tainted by the photographic lineup.

The defendant excepted only to Finding of Fact No. 12 and to that portion of the conclusion in which the court concluded that the in-court identification was based upon Ms. Penny's independent recollection of her observation of her assailant at the time of the crime. After reviewing the evidence we are forced to conclude that the evidence does not support Finding of Fact No. 12. There was direct evidence presented during her *voir dire* examination that Ms. Penny did not pay "close attention" to the face and facial features of her assailant. We do not believe, however, that the trial court erred in its admission of the identification evidence for the following reasons. Because defendant failed to except to any of the other findings of fact, the question of whether there is sufficient evidence to support these findings is not before us. *State*

State v. Lassiter

v. Tate, 300 N.C. 180, 184, 265 S.E. 2d 223, 226 (1980). We believe that the non-excepted-to findings are sufficient to support the conclusion that the identification was based upon Ms. Penny's independent recollection of her observations.

Five factors to be considered when determining whether an out-of-court identification procedure was so impermissibly suggestive so as to render the in-court identification inadmissible are: (1) the opportunity of the witness to view the criminal; (2) the witness' degree of attentiveness; (3) the accuracy of the witness' principal description; (4) the level of certainty at confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983). In the case *sub judice* the trial court found that the witness was able to observe the criminal in a well-lighted area for five minutes. Further, the witness was able to positively identify the defendant in a photographic lineup within a relatively short time, one month, after the offense occurred. Furthermore, the description which Ms. Penny gave on the day of the robbery matched the general description of the defendant. Considering this uncontroverted evidence, we find that the trial court's admission of the identification testimony was proper. The assignments of error are overruled.

For the reasons stated earlier, defendant is awarded a

New trial.

Judges WEBB and EAGLES concur.

Sola Basic Industries v. Electric Membership Corp.

SOLA BASIC INDUSTRIES, INC. D/B/A HEVI-DUTY ELECTRIC, A UNIT OF GENERAL SIGNAL CORPORATION v. PARKE COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

No. 838SC1320

(Filed 16 October 1984)

Constitutional Law § 24.7— jurisdiction over foreign corporation—insufficient contacts

The exercise of jurisdiction by North Carolina over defendant, a foreign corporation, violates due process where a transformer was sold to defendant as a result of solicitation by plaintiff's agents in Indiana, where defendant is located; where there are no other contacts between defendant and North Carolina; where the transformer was moved to North Carolina for repairs and a contract entered into in North Carolina; where the contract does not require application of North Carolina law; and where nothing in the record indicates that defendant chose the repair location or that other locations were available. G.S. 1-75.4(5)a.

APPEAL by defendant from *Peel, Elbert S., Judge*. Order entered 12 September 1983 in WAYNE County Superior Court. Heard in the Court of Appeals 27 September 1984.

Plaintiff Hevi-Duty is a Wisconsin corporation with a plant in Goldsboro, North Carolina. Defendant Parke County Rural Electric Membership Corporation is an Indiana corporation, which serves only Indiana customers and purchases its electricity from other Indiana companies. Defendant purchased a large transformer from plaintiff in 1979, pursuant to a contract solicited and negotiated in Indiana by agents of plaintiff. In January 1982 the transformer failed, and defendant arranged to have it removed and repaired. Plaintiff's employees came to Indiana and brought the transformer back to North Carolina; a representative of defendant came to Goldsboro to witness the repair work. After the transformer arrived in Goldsboro, in February 1982, plaintiff informed defendant that the warranty had expired and the parties entered into a contract whereby defendant would pay for the repairs. The transformer was repaired and returned, but defendant refused to pay. Plaintiff brought the present action in Wayne County Superior Court; defendant moved to dismiss for lack of personal jurisdiction, but the motion was denied. Defendant appealed.

Sola Basic Industries v. Electric Membership Corp.

Dees, Smith, Powell, Jarrett, Dees & Jones, by William W. Smith and Tommy W. Jarrett, for plaintiff.

Barnes, Braswell & Haithcock, P.A., by Henson P. Barnes, for defendant.

WELLS, Judge.

This appeal is properly before this court. N.C. Gen. Stat. § 1-277(b) (1983). It presents only one question, whether the trial court properly denied defendant's motion to dismiss for lack of jurisdiction over the person. We hold that it erred and reverse.

To determine if a foreign corporation may be subjected to *in personam* jurisdiction in this state, we apply a two-pronged test. First, do the North Carolina jurisdictional statutes permit our courts to entertain an action against the defendant? And second, does the exercise of that jurisdiction comport with due process of law? See *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *Delprinting Corp. v. C.P.D. Corp.*, 49 N.C. App. 449, 271 S.E. 2d 548 (1980).

The first prong of the test is easily satisfied. Under our "long arm" statute, N.C. Gen. Stat. § 1-75.4(5)a. (1983), a promise "made anywhere" to pay for services to be performed in North Carolina suffices to confer jurisdiction. The evidence clearly shows that defendant promised to pay for repairs to the transformer, and that those repairs were to be accomplished in North Carolina, thus satisfying this statute.

This exercise of statutory jurisdiction must satisfy elementary constitutional due process, however, as embodied in the familiar "minimum contacts" test: "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)). In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), the Court held that a single life insurance contract justified California's exercise of jurisdiction over a Texas insurer, since the contract had a "substantial connection" with the state. Later the same term,

Sola Basic Industries v. Electric Membership Corp.

however, the Court tempered the broad sweep of *McGee* in *Hanson v. Denckla*, 357 U.S. 235 (1958), holding that a Delaware trustee of a Florida decedent's property, which had never itself performed any acts in Florida, had not availed itself of the protection of Florida's law and thus was not subject to personal jurisdiction in Florida. The Court held:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant *purposefully avails itself of the privilege of conducting activities within the forum State*, thus invoking the benefits and protections of its laws.

Id. at 253 [cite omitted] [emphasis added].

Left unresolved in *Hanson v. Denckla*, *supra*, was the question of personal jurisdiction over nonresident corporate defendants based on contractual dealings with corporate plaintiffs. A substantial division and confusion of authority has resulted. See *Lakeside Bridge & Steel v. Mountain State Const.*, 597 F. 2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980) (cases collected). The United States Supreme Court has refused to date to address the issue, however. See *Baxter v. Mouzavires*, 455 U.S. 1006 (1982) (mem.) (White, J., dissenting); *Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994 (1982) (mem.) (White, J., dissenting).

In *Lakeside Bridge & Steel v. Mountain State Const.*, *supra*, a West Virginia construction firm, which did business only in West Virginia, had contracted to build a dam there. Representatives of a Wisconsin firm submitted proposals for a steel sub-contract, which the general contractor accepted by mailing a purchase order to Wisconsin. The steel was delivered and installed in the dam, but the general contractor refused to pay. The Seventh Circuit held that since the contact relied upon was the performance by the Wisconsin plaintiff, not the defendant, in Wisconsin, and since the contract did not *require* performance in Wisconsin, personal jurisdiction could not be constitutionally exercised over the West Virginia defendant in Wisconsin. The court

Sola Basic Industries v. Electric Membership Corp.

relied heavily on the "unilateral activity" language in *Hanson v. Denckla, supra*.

A similar result was reached in *United Advertising Agency, Inc. v. Robb*, 391 F. Supp. 626 (M.D. N.C. 1975). There, Kansas and Missouri restaurants engaged a North Carolina advertising agency to perform certain advertising services, and the agency prepared its materials in North Carolina. Upon the restaurants' failure to pay, the agency brought an action in North Carolina. In holding that due process forbade this exercise of jurisdiction, the court, following *Aftanase v. Economy Baler Company*, 343 F. 2d 187 (8th Cir. 1965) (Judge, now Justice, Blackmun), applied the following primary factors: (1) quantity of contacts, (2) nature and quality of contacts, and (3) the source and connection of the cause of action with these contacts; two other factors, interest of the forum state and convenience, also enter the consideration. *United Advertising Agency, Inc. v. Robb, supra*. Relying again on the "unilateral activity" language in *Hanson v. Denckla, supra*, the court held that since the defendants had made no attempt to enter the market in North Carolina or otherwise advance their position by contacts in this state, or to use the law of North Carolina to their advantage, and since all benefit to them would occur in Kansas or Missouri, the fact that the services were performed in North Carolina was "truly incidental"; the services could have been prepared anywhere, at plaintiff's unilateral discretion. *United Advertising Agency, Inc. v. Robb, supra*. The court also concluded that the state interest and convenience factors did not justify North Carolina jurisdiction, noting that, unlike *McGee v. International Life Ins. Co., supra*, the case did not involve a resident non-business individual against a well-financed corporation. *United Advertising Agency, Inc. v. Robb, supra*. Reviewing all these factors, the court concluded that to exercise jurisdiction would clearly violate the due process clause of the 14th amendment. See also *Tyee Constr. Co. v. Dulien Steel Products, Inc.*, 62 Wash. 2d 106, 381 P. 2d 245 (1963) (multi-factor test) (no jurisdiction based on "isolated business excursion").

Turning to the present case, we are faced with an apparently novel due process problem: does a single executed contract to repair a single piece of personal property for a nonresident corporation with no other contacts constitutionally allow exercise of personal jurisdiction? We have not discovered any "repair" cases

Sola Basic Industries v. Electric Membership Corp.

on point. The few "repair" cases we have found do not address the particular issue here. A long-term repair contract, connected to a lease agreement, justified jurisdiction in one case. *United States Ry. Equip. Co. v. Port Huron & Detroit R. Co.*, 495 F. 2d 1127 (7th Cir. 1974). On the other hand, attempts by a Kansas purchaser to get a Wisconsin seller to come to Kansas to repair phone equipment did not. *Jadair, Inc. v. Walt Keeler Co., Inc.*, 679 F. 2d 131 (7th Cir.), *cert. denied*, 459 U.S. 944 (1982). The present case lies somewhere in between.

Turning to the factors outlined in *United Advertising Agency, Inc. v. Robb, supra*, we note first that the transformer was sold as a result of solicitation by plaintiff's agents in Indiana. There appear to be no other contacts, other than those involving this one transformer, between defendant and North Carolina. The amount of the contract, standing alone, does not supply sufficient contact. Turning to the "heart" of the issue, we conclude that plaintiff has failed to show the requisite "substantial connection." By its very nature as a rural electric corporation, defendant operates in a very limited geographic area. Only *after* the transformer had been removed to Goldsboro, while still apparently under warranty, did plaintiff notify defendant that payment was expected, and only then was a contract entered into. The contract does not require application of North Carolina's law. Nothing in the record indicates that defendant chose the repair location or that there were no other locations to repair the transformer. There does not appear to be a preferable forum to Indiana. In light of *United Advertising Agency, Inc. v. Robb, supra*, then, we conclude that the exercise of jurisdiction in this case violates due process.

The North Carolina cases involving contracts between two corporations do not compel a different result. In *Harrelson Rubber Co. v. Dixie Tire and Fuels*, 62 N.C. App. 450, 302 S.E. 2d 919 (1983), a tire supply contract expressly provided that North Carolina law would apply, and the South Carolina defendant purchased and shipped raw materials to plaintiff's plants in North Carolina over a seven-year period. And in *Delprinting Corp. v. C.P.D. Corp., supra*, a lengthy pattern of business between the two corporations existed and the Illinois defendant had taken over an existing North Carolina corporation with which the plaintiff corporation had enjoyed business relations. *See also Fiber Industries*

Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.

v. Coronet Industries, 59 N.C. App. 677, 298 S.E. 2d 76 (1982) (single contract, but defendant did millions of dollars in business annually in North Carolina); *Leasing Corp. v. Equity Associates, Inc.*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978) (four-year contractual relationship; contract made in North Carolina, stated North Carolina law applied). In these cases minimum contacts were properly found.

The present case, involving an "isolated business excursion," is clearly distinguishable. More on point is *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E. 2d 476 (1980), where plaintiff predicated jurisdiction on the processing of a single order in North Carolina although all other acts relating to the contract occurred in South Carolina, including the solicitation of the order by plaintiff. Insufficient contacts were found.

Defendant in this case does no business in North Carolina and has not attempted to avail itself of the protection of the laws of North Carolina. We conclude that plaintiff has not shown minimum contacts by defendant sufficient to constitutionally justify the exercise of personal jurisdiction. Accordingly, the court erred in denying defendant's motion to dismiss and the order appealed from must be reversed. The cause is remanded for entry of an order dismissing the complaint.

Reversed and remanded.

Judges ARNOLD and HILL concur.

LUMBERMENS MUTUAL CASUALTY COMPANY v. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

No. 8318SC1304

(Filed 16 October 1984)

1. Insurance § 88— garage owner—helping start customer's vehicle—garage liability policy

Where a truck was being driven on the highway by a service station-garage owner after he had serviced it for the purpose of assisting the customer to start the truck, the garage owner was engaged as a matter of law in an operation incidental to the use of the premises as a garage, and an acci-

Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.

dent which occurred while the garage owner was so driving the truck was covered by the owner's garage liability policy.

2. Trial § 3.1— denial of continuance

The trial court did not abuse its discretion in denying defendant's motion to continue a hearing on a summary judgment motion where the court noted that the case had been pending for eighteen months, the motion for summary judgment had been on file for five months, and defendant was represented by a firm of six attorneys, any of whom were capable of mastering the case file.

APPEAL by defendant from *Wood, Judge*. Judgment entered 9 September 1983, *nunc pro tunc* 1 September 1983, in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 September 1984.

Plaintiff sued for contribution toward amounts spent in investigating, defending and settling a personal injury claim against defendant's insured. Defendant denied that its garage liability policy afforded coverage to its insured. The trial court entered summary judgment for plaintiff in the amount of \$21,145.06.

Defendant appeals.

Tuggle, Duggins, Meschan & Elrod, P.A., by J. Reed Johnston, Jr., for plaintiff appellee.

Henson, Henson & Bayliss, by Perry C. Henson and Jack B. Bayliss, Jr., for defendant appellant.

WHICHARD, Judge.

Defendant raises two questions: whether summary judgment was properly granted for plaintiff, and whether the court abused its discretion in denying defendant's motion to continue. We affirm.

I.

[1] Plaintiff and defendant agree on the terms of defendant's policy and on the facts giving rise to this case. The issue is whether defendant's policy provides coverage for defendant's insured under the undisputed facts. These facts are as follows:

Defendant's insured is a service station owner, insured by defendant under a garage liability policy which provides coverage for bodily injury sustained in connection with garage operations.

Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.

Plaintiff's insured owned tractor-trucks insured by plaintiff under an automobile liability policy which also provides coverage for personal injury claims.

Plaintiff's insured brought three of his tractor-trucks to the garage of defendant's insured for routine servicing. When plaintiff's insured returned to pick up the trucks, one of them failed to start. He asked defendant's insured to help him fire the cold diesel engine of the stalled truck. As a favor and at no extra charge, defendant's insured drove the truck while plaintiff's insured towed it along the adjacent highway. When the stalled truck fired, the two trucks stopped in the road. Defendant's insured remained at the wheel while the air brakes on the truck that had been stalled pressurized. At the same time employees of plaintiff's insured began to disconnect the towline. When defendant's insured determined that the brakes were pressurized, he began to pull the truck off the road. In so doing he struck and injured an employee of plaintiff's insured.

The employee brought negligence actions against the owner of the truck, plaintiff's insured, and against the driver, defendant's insured. Defendant denied coverage and declined to defend its insured. Both policies contain identical "Other Insurance" clauses. It is not disputed that if defendant's policy provides coverage defendant is liable to plaintiff in the amount of the judgment.

II.

By its terms defendant's policy provides coverage for bodily damage "caused by an occurrence and arising out of garage operations." Garage operations are defined as "the ownership, maintenance or use of the premises for the purposes of a garage and all operations necessary or incidental thereto."

The question refined, therefore, is whether defendant's insured, while driving the truck at the request of plaintiff's insured for the purpose of assisting plaintiff's insured to start the truck, was engaged in an operation "incidental" to the operation of his service station. This is a question of "the meaning of the language used in [defendant's] policy of insurance[.]" *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518, 522 (1970). It is therefore a question of law. *Id.*

Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.

While some courts are reluctant to apply the rule of liberal construction to suits between insurers, *see* 13 Appleman, Insurance Law and Practice § 7482, at 566 (1981), as a rule any ambiguity in an insurance policy is liberally construed against the insurer. *Trust Co. v. Insurance Co.*, 276 N.C. at 354, 172 S.E. 2d at 522. The mere fact, however, that each of two parties interprets the term "incidental" to its own advantage does not establish that the term is uncertain or ambiguous. No ambiguity exists unless, "in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E. 2d 907, 908 (1981).

We are satisfied that the term "incidental," as applied to the undisputed facts here, is not ambiguous. It is a nontechnical word and, unless the context requires otherwise, must be given a meaning consistent with its use in ordinary speech. *Trust Co. v. Insurance Co.*, 276 N.C. at 354, 172 S.E. 2d at 522; *Peirson v. Insurance Co.*, 249 N.C. 580, 107 S.E. 2d 137 (1959). In ordinary speech, incidental means subordinate, nonessential, occurring merely by chance or without intention or calculation, or being likely to ensue as a chance or minor circumstance. Webster's Third International Dictionary (1968).

"Courts have frequently been called upon to interpret the word 'incidental.'" *Peirson v. Insurance Co.*, 249 N.C. at 583, 107 S.E. 2d at 139 (held plaintiff's mercantile business not incidental to business of repairing, servicing and storing automobiles protected by policy). "Ordinarily, that which is incidental can only be determined from the facts and circumstances of each case. Thus, a question of fact will be presented for determination of the trier of the facts in most cases." Long, 2 Law of Liability Insurance § 7.06, at 7-8 (1984). This case, as stated, however, does not present a factual dispute. While defendant contends that the two affidavits of its insured raise issues of material fact, we find that contention without merit. The affidavits differ merely in wealth of detail.

III.

Cases finding no coverage under the policy term in question are distinguishable from this one on their facts. In *Peirson v. Insurance Co.*, 249 N.C. at 584, 107 S.E. 2d at 139, our Supreme

Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.

Court distinguished "something [that is] incidental to the main purpose" from something that is not, by citing the following cases: *Spiegel v. Felton*, 134 N.Y.S. 2d 242, 206 Misc. 499 (1954) (sale of Christmas trees not incidental to operation of a parking lot); *Boh v. Pan American Petroleum Corp.*, 128 F. 2d 864 (5th Cir. 1942) (use of premises for unrelated commercial advertising not an activity incidental to operation of a filling station); *Heritier v. Century Indemnity Co.*, 162 A. 573 (N.J. 1932) (transportation of wedding parties not an incidental part of funeral business).

The accident here, by contrast, was clearly a natural consequence of the operation of a service station. It is patently unreasonable to expect that a service station owner would not help a customer start a vehicle the owner has just serviced. That the owner renders the aid voluntarily, to obtain or maintain good will, and for no extra charge, does not remove the act from the range of coverage. See, e.g., *Calkins v. Merchants Mutl. Ins. Co.*, 399 N.Y.S. 2d 811, 59 A.D. 2d 1052 (1977) (insured's sale or gift of a steel drum to a third party who brought suit for injuries sustained when cutting through the drum held part of garage operations necessary or incidental to the garage itself); *Lowry v. Kneeland*, 263 Minn. 537, 117 N.W. 2d 207 (1962) (driver within coverage when returning demonstrator to garage after having taken insured to airport, even though such service was of a temporary duration and uncompensated).

We hold that the court ruled correctly that an accident on a highway, when a stalled truck is being started by a garage owner after he has serviced it, is as a matter of law an operation incidental to the use of the premises as a garage. The language of the policy, as applied to the undisputed facts, is not reasonably susceptible to any other construction. As stated in *Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y. 2d 356, 361, 357 N.Y.S. 2d 705, 708, 314 N.E. 2d 37, 39 (1974): "We cannot think that, given the economic and factual setting in which [this policy was] written, an ordinary businessman in applying for insurance and reading the language of [this policy] when submitted, would not have thought himself covered against precisely the damage claims now asserted"

State v. Spears

IV.

[2] Defendant contends the court erred in denying its motion to continue. The granting of a continuance is within the discretion of the trial court and absent a manifest abuse of discretion its ruling is not reviewable on appeal. *Tripp v. Pate*, 49 N.C. App. 329, 331, 271 S.E. 2d 407, 408 (1980). In denying defendant's motion, the court noted that: the case had been pending for eighteen months; the motion for summary judgment had been on file for five months; and defendant was represented by a firm of six attorneys, any of whom, including present counsel, were capable of mastering the case file. Under these circumstances we find no abuse of discretion in the denial of the motion.

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. MARK A. SPEARS

No. 8412SC51

(Filed 16 October 1984)

1. Criminal Law § 52— medical testimony—opinion as to character of metallic artifacts—admissible

There was no error in allowing a physician who treated an assault victim to testify that there were metallic artifacts on the victim's head "like something frequently seen in gunshot wounds" where the doctor had been admitted as an expert in neurosurgery, but not in forensic medicine or ballistics; the doctor's expertise in the use of the CAT scan as a diagnostic tool was unchallenged; and the doctor testified concerning an objective finding of his examination, did not assert that the injury was caused by a shotgun or express an opinion as to the guilt or innocence of defendant.

2. Criminal Law § 102.6— prosecutor's argument—characterization of crime—proper

Although a prosecutor characterized the crime as terrible and may have improperly traveled outside the record and injected his own personal beliefs, he made no comment as to the character of the defendant and there was no prejudicial error.

State v. Spears

3. Criminal Law § 138— mitigating circumstances—non-statutory factors—obtaining medical aid for victim

In a prosecution for assault with a deadly weapon inflicting serious injury, there was no error in the trial court's failure to consider as a mitigating factor that defendant took the victim to an emergency clinic. The consideration of non-statutory mitigating factors is within the discretion of the trial judge; it is significant in this case that defendant put the victim in need of medical attention. G.S. 15A-1340.4(a).

Judge WELLS concurring in part and dissenting in part.

APPEAL by defendant from *Britt, Samuel E., Judge*. Judgment entered 5 October 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 25 September 1984.

Defendant was convicted of assault with a deadly weapon inflicting serious injury and was sentenced to ten years imprisonment, a sentence in excess of the presumptive term. From the judgment entered, he appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney General Michael Smith, for the State.

Appellate Defender Adam Stein for defendant-appellant.

HILL, Judge.

The State's evidence tends to show that defendant spent the afternoon of 19 November 1982 with Kathy Williams and Judy Gibson in their trailer drinking beer and smoking marijuana. The three decided to go in defendant's pickup truck to a local tavern. On the way, defendant suggested going to a wooded area to smoke more marijuana and the women agreed. The defendant pulled off the road into a wooded area where the three drank beer and smoked marijuana. When Ms. Williams and Ms. Gibson told defendant they were ready to leave, defendant pulled a shotgun out of the truck, pointed it at the women, and told them to get out of the truck. When the women hesitated, defendant grabbed Ms. Gibson by the hair and jerked her out of the truck. Defendant ordered the women to lie face down on the ground and not look at each other. The women protested but complied with his demands.

Ms. Williams testified that while she was on the ground defendant put the gun between her legs and she heard a click. She

State v. Spears

testified that defendant told her he should kill her now. Ms. Gibson testified that defendant then went over to her, fondled her breasts, put the gun to her head, and told her to stand up and take off her shirt. Ms. Gibson stood up and began to take off her shirt as ordered, then pulled it down and started running while calling to Ms. Williams to get up and run also. As the two women began running away, defendant called out to Ms. Gibson, "Judy, I'm not playing with you, I'll kill you." Defendant then fired a shot and Ms. Gibson noticed she was bleeding from the head. Defendant then came over to Ms. Gibson and hit her in the mouth and on the head with the gun until she lost consciousness.

Defendant's version of the events leading up to the shooting was as follows: He testified that while he and Ms. Gibson and Ms. Williams were smoking marijuana and talking in the woods, Ms. Gibson got out of the truck to use the bathroom. While she was gone, he continued to talk to Ms. Williams until he heard a noise. He turned and saw Ms. Gibson pointing a rifle at him. Defendant testified that Ms. Gibson told him to get out of the truck. As he began to get out of the truck, he grabbed the gun from her causing it to go off. Ms. Gibson backed off and stated, "I have been shot." Defendant testified that as he stood there looking at her, Ms. Gibson started coming toward him with a knife. Defendant then hit Ms. Gibson with the gun and the butt of the gun flew off. Ms. Gibson fell down but got up and came after defendant again. Defendant hit her with the gun again and she fell down. He looked for Ms. Williams but could not find her. Defendant put Ms. Gibson in his truck and transported her to an emergency clinic where he knocked on the door and left her on the steps.

[1] In his first assignment of error defendant contends the trial court erred by allowing Dr. Pennick, the physician who treated Ms. Gibson after she was injured, to express his opinion as to the character of metallic artifacts he found on the left side of Ms. Gibson's head. After defendant left Ms. Gibson at the emergency clinic, she was treated by Dr. Pennick, who found her on the steps of the clinic bleeding from the head. Ms. Gibson had a severe depressed skull fracture and lacerations on her head. Dr. Pennick did a CAT scan of Ms. Gibson's head to help ascertain the extent of her injuries. Dr. Pennick testified that the resulting x-ray films revealed, "some metallic artifacts on the left side of the head in-

State v. Spears

dicating some metals, and it looks like something very frequently seen in gunshot wounds, some pellets. . . .”

The defendant asserts that although Dr. Pennick was properly admitted as an expert in neurosurgery, he was not an expert in forensic medicine or ballistics and therefore could not properly testify as to the character of the metallic artifacts seen on the CAT scan x-ray film. The standard used to determine whether an expert is competent to give an opinion concerning an issue at trial is whether:

- 1) the witness because of his expertise is in a better position to have an opinion on the subject than the trier of fact,
- 2) the witness testifies only that an event *could* or *might* have caused an injury but does not testify to the conclusion that the event did in fact cause the injury . . . and
- 3) the witness does not express an opinion as to the defendant's guilt or innocence.

State v. Brown, 300 N.C. 731, 733, 268 S.E. 2d 201, 203 (1980).

At trial, defendant stipulated that Dr. Pennick was an expert in the field of neurosurgery and the court accepted him as such. Defendant did not challenge Dr. Pennick's expertise in the use of the CAT scan as a diagnostic tool. Dr. Pennick testified concerning an objective finding of his examination, that there were metallic artifacts on the left side of Ms. Gibson's head. His characterization of these artifacts as, “like something frequently seen in gunshot wounds” did not assert that in fact the injury was caused by a shotgun. In addition, Dr. Pennick expressed no opinion as to the guilt or innocence of the defendant. Therefore, we conclude that Dr. Pennick did not exceed his area of expertise by expressing his opinion based upon facts admittedly within his knowledge. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976).

[2] Defendant next contends the prosecutor made an improper closing argument to the jury. As part of his closing argument the prosecutor said:

As part of everyday experience, we hear about a crime being committed some place. We say to ourselves, that's terrible. I submit to you, this is one of those crimes. We go on

State v. Spears

further and say to ourselves, something ought to be done about that. . . . They ought to do something. Ladies and Gentlemen, you twelve judges of Cumberland County are now in a position to do something about that.

It is well settled that counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). The scope of the arguments to the jury is in the sound discretion of the trial judge and his ruling will not be disturbed except upon a finding of prejudicial error. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). Here, although the prosecutor characterized the crime committed as terrible, he made no comment as to the character of the defendant. *See State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). The prosecutor may have improperly traveled outside the record and injected his own personal beliefs, but we do not believe the digression constituted prejudicial error.

[3] Lastly, defendant assigns as error the trial court's failure to find as a mitigating factor that immediately after the commission of the offense, he transported Ms. Gibson to an emergency clinic where she received life saving treatment.

The court's discretion to impose a sentence within the statutory limits, but greater or lesser than the presumptive term is carefully guarded by the requirement that he make written findings in aggravation or mitigation which findings must be proved by a preponderance of the evidence. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). The sentencing judge *must* consider each of the statutory aggravating or mitigating factors. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). The sentencing judge *may* consider other aggravating or mitigating factors which are not set forth in the statute that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing. G.S. § 15A-1340.4(a). That defendant took Ms. Gibson to an emergency clinic does not fall within the enumerated mitigating factors and thus it was within the sound discretion of the trial judge to consider it or not as he chose.

It is significant that defendant put Ms. Gibson in need of medical attention. Indeed, Ms. Gibson might have died had she not received prompt medical attention. The court properly con-

Mebane v. General Electric Co.

sidered that the defendant's actions were not in mitigation of his crime but merely prevented the charge from being more serious.

We hold the defendant received a fair trial free from prejudicial error.

No error.

Judge ARNOLD concurs.

Judge WELLS concurs in part and dissents in part.

Judge WELLS concurring in part and dissenting in part.

I concur with the majority that there was no error in the trial.

I dissent from the majority on the issue of sentencing. I am persuaded that defendant's actions in rendering aid to his victim required the finding of that mitigating factor. First, the evidence clearly established that defendant rendered aid to his victim. Second, such conduct should be encouraged in the sentencing process and is therefore reasonably related to the purpose of sentencing.

Should it be finally determined that trial courts are not required to find a mitigating factor of rendering aid to a victim by a perpetrator as a non-statutory factor, where the evidence supports such a finding, I would urge legislative consideration of making such circumstances a statutory mitigating factor.

MELINDA MEBANE, EMPLOYEE, PLAINTIFF v. GENERAL ELECTRIC COMPANY, EMPLOYER, AND ELECTRIC MUTUAL LIABILITY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8318IC1234

(Filed 16 October 1984)

1. Master and Servant § 95.1— workers' compensation—appeal to Full Commission—waiver of procedural rule

By hearing plaintiff's appeal, the Full Commission waived plaintiff's compliance with a procedural rule and in effect determined defendant's motion to dismiss plaintiff's appeal for failure to comply with that rule. Industrial Commission Rule XXI(2).

Mebane v. General Electric Co.

2. Master and Servant § 56— workers' compensation—cause of blackouts and dizziness—supporting evidence

Competent medical evidence, although conflicting, was sufficient to support a determination by the Industrial Commission that plaintiff's disabling blackout spells and dizziness are not the result of a head injury received in a work-related accident but are the result of surgery for a congenital brain disorder.

APPEAL by plaintiff from order of the North Carolina Industrial Commission entered 15 June 1983. Heard in the Court of Appeals 20 September 1984.

Plaintiff claimed workers' compensation benefits after experiencing a work related accident on 23 August 1979. She fell from a ladder striking her face in the area of the right eye, resulting in an immediate tonic-clonic seizure and temporary unconsciousness. Plaintiff and defendants entered into a voluntary agreement on 17 September 1979 compensating plaintiff for medical expenses and loss of wages for temporary total disability until 1 June 1980.

During treatment for the employment related injury by Dr. James Love, plaintiff experienced continuing headaches and sensations behind the right eye. Dr. Love discovered that plaintiff had a potentially fatal congenital arteriovenous malformation, a brain lesion that was coincidentally situated near the area of her head injury. It is undisputed that the congenital malformation was neither caused nor aggravated by plaintiff's fall. Plaintiff was treated with anti-seizure medication and the brain malformation was successfully corrected surgically on 16 October 1979 by Dr. Stephen Robinson.

Following the operation and until May 1980, plaintiff experienced tingling in her left hand and recurring headaches, but progressed to the point that Dr. Robinson released plaintiff to return to work beginning in June 1980. In July 1980, plaintiff consulted Dr. Love who detected a decreased left feature of the mouth. He reduced dosages of anti-seizure medication. Plaintiff developed persistent episodes of dizziness when turning her head or bending forward. By December 1980, plaintiff was experiencing sudden blackout spells accompanied by falling. In January 1981, Dr. Jefferson Kiser treated plaintiff for the blackout episodes, occurring several times per month, and persistent headaches. Anti-seizure medications failed to control her condition.

Mebane v. General Electric Co.

Plaintiff filed for continuing workers' compensation benefits alleging that her condition was the result of her employment related accident. Defendants denied liability alleging that plaintiff's condition was the result of the congenital brain disorder and subsequent surgery. Deputy Commissioner Ben Roney, Jr., held that plaintiff was not entitled to additional workers' compensation benefits. His pertinent findings of fact, to which plaintiff excepts are:

16. Claimant's blackout spells and dizziness are not the result of injuries suffered in the 23 August 1979 fall.

17. Incapacity to earn wages experienced by claimant after 1 June 1980 has not been occasioned by the injuries suffered in the 23 August 1979 fall.

Commissioner Roney's order, dated 2 September 1982, concluded from these and other findings of fact that plaintiff was not entitled to workers' compensation benefits beyond 1 June 1980 already compensated by agreement of the parties.

On 17 September 1982, plaintiff filed notice of appeal to the Full Commission. The Full Commission heard the appeal and adopted Commissioner Roney's opinion, with one commissioner dissenting. Plaintiff appealed and defendants cross-assigned error for failure of the Commission to dismiss plaintiff's appeal to the Full Commission.

Bowden & Bowden, by Joel G. Bowden, for plaintiff.

Smith, Moore, Smith, Schell & Hunter, by Jeri L. Whitfield, for defendants.

WELLS, Judge.

[1] Defendants cross-assign error to the Industrial Commission's failure to grant dismissal of plaintiff's appeal to the Full Commission because plaintiff failed to comply with Rule XXI of the Rules of the North Carolina Industrial Commission. Rule XXI(2) states that:

[T]he Commission will supply to the appellant proper form upon which he must state the particular grounds for his appeal. This form must be filed with the Commission, copy to appellee, within ten (10) days of appellant's receipt of

Mebane v. General Electric Co.

transcript of the record, unless the use of such forms shall, in the discretion of the Commission, be waived.

The transcript of the hearing before Commissioner Roney was filed on 16 December 1982. On 23 March 1983, defendants filed the motion to dismiss. On 12 May 1983, plaintiff filed an application for review in accordance with Rule XXI(b).

The record on appeal is devoid of information showing whether or not the Industrial Commission considered defendant's motion. It is apparent the Full Commission waived defendant's motion by hearing plaintiff's appeal. Rule XXIV of the Rules of the North Carolina Industrial Commission provide that "[i]n the interest of justice, any procedural rule may be waived. . . ." In *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 286 S.E. 2d 837 (1982), we held that "[t]he exercise of [the Commission's] . . . discretion in such matters is not reviewable by the courts, absent a showing of manifest abuse of that discretion." Defendant has made no showing of abuse of discretion. This assignment of error is overruled.

[2] Plaintiff contends that the Deputy Commissioner erred in finding that (1) the plaintiff's blackout spells and dizziness are not the result of the employment accident; (2) the resulting incapacity to earn wages was not the result of that accident; and (3) the Full Commission erred in adopting the Deputy Commissioner's finding of fact and conclusion of law that plaintiff's incapacity to earn wages was not the result of the accident. Our courts have consistently held that workers injured in compensable accidents are entitled to be compensated for all disability caused by and resulting from the compensable injury. *Giles v. Tri-State Erectors*, 287 N.C. 219, 214 S.E. 2d 107 (1975); *accord Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978); *Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 308 S.E. 2d 485 (1983), *disc. rev. denied*, 310 N.C. 309, 312 S.E. 2d 652 (1984). In this case, the parties stipulated that plaintiff was entitled to compensation for medical expenses and temporary permanent disability from the date of the employment accident until 1 June 1980. The issue presented is whether or not plaintiff is entitled to disability benefits beyond that date. The pivotal question in each of plaintiff's assignments of error is whether plaintiff's disabling seizures are the result of her employment related injury or the congenital brain disorder.

Mebane v. General Electric Co.

We first note that jurisdiction of appellate courts in reviewing a decision of the Industrial Commission is limited to the questions (1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions. *Perry v. Furniture Co., supra*. The Industrial Commission's findings of fact "are conclusive on appeal when supported by competent evidence even though there is evidence to support contrary findings. . . ." *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E. 2d 215 (1983), *reh. denied*, --- N.C. ---, 311 S.E. 2d 590 (1984). We find that Commissioner Roney's findings cited above, and adopted by the Full Commission, are supported by competent evidence of Dr. Love even though contradicted by Dr. Kiser. The findings of fact, in turn, support the legal conclusions of the Commission.

Dr. Love, a neurologist qualified as an expert witness, treated plaintiff from 31 August 1979 until December 1980. He performed extensive diagnostic tests in treating plaintiff. In his opinion, plaintiff's blackout spells were caused by either the arteriovenous malformation or the physiological changes resulting from the corrective surgery. He ruled out post-traumatic epilepsy resulting from plaintiff's fall, but admitted that absolute certainty was impossible. Dr. Robinson, plaintiff's neurosurgeon and qualified as an expert witness, testified that the cause of plaintiff's seizures could be either the brain malformation or the trauma produced by the fall. It is his experience that where the dura mater surrounding the brain is punctured, as in plaintiff's surgery, the chance of resulting seizure disorder exceeds sixty percent compared to a five percent probability of such disorder associated with a closed head injury, as in plaintiff's fall.

Dr. Kiser, a neurologist and qualified as an expert witness, treated plaintiff since 16 January 1981 in an attempt to control her seizures, dizziness, and headaches. He thoroughly reviewed the previous medical history and performed numerous diagnostic tests. His opinion is that plaintiff's seizures may have manifested themselves prior to surgery and were attributable to plaintiff's accident. His diagnosis is that her condition will not improve.

Plaintiff contends that Dr. Love and Dr. Robinson's evidence is incompetent to find that plaintiff's disability is related to the congenital brain malformation. Plaintiff argues that both physi-

State v. Lester

cians based their testimony on statistical probabilities that patients with penetration of the dura mater will suffer seizures more frequently than patients with closed head trauma. Both doctors, especially Dr. Robinson, relied on statistical probabilities. The record discloses, however, that Dr. Love, also based his opinion on numerous specific findings relating to this plaintiff that are not based on mere statistical comparisons.

Defendants argue that because of the conflicting medical evidence the determination of this case must be based on statistical probabilities. We reject this assertion. We agree with that part of Commissioner Charles Clay's reasoned statement in dissent from the Full Commission that "the decision in this case should be based not on general 'medical probabilities' but upon the medical evidence in this specific case. . . ."

We hold that competent, albeit conflicting, evidence was introduced by plaintiff and defendants on the issue of causation of plaintiff's disability. The Industrial Commission's findings are supported by that evidence and are conclusive on appeal, *Dowdy v. Fieldcrest Mills*, *supra*. The findings support the Commission's legal conclusions, *Perry v. Furniture Co.*, *supra*. The decision of the Industrial Commission must be and is hereby

Affirmed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. MATTHEW DOUGLAS LESTER

No. 8317SC1324

(Filed 16 October 1984)

Rape and Allied Offenses § 5— insufficient evidence of force

The evidence was insufficient to show that defendant *forcibly* raped his daughter where the evidence tended to show that defendant had frequently beaten his wife prior to their divorce, that defendant had beaten his girl friend and his son, that defendant had pointed a gun at his children, that defendant had threatened to kill his wife and one of his daughters when confronted with his wife's knowledge of his sexual activity with his daughter, and that the daughter had initially refused defendant's advances on the two occasions in

State v. Lester

question here, but finally gave in when she perceived that defendant was getting angry. G.S. 14-27.3.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Collier, Judge*. Judgments entered 14 July 1983 in Superior Court, SURRY County. Heard in the Court of Appeals 20 September 1984.

Defendant was charged in proper bills of indictment with two counts of felonious incest, Case Nos. 83CRS645 and 83CRS1469, and two counts of second degree rape, Case Nos. 83CRS1243 and 83CRS1244.

The defendant was found guilty as charged, and from a consolidated judgment imposing a prison sentence of 12 years in the cases charging the defendant with felonious incest and second degree rape, Case Nos. 83CRS1469 and 83CRS1244, and from a consolidated judgment imposing a prison sentence of 12 years in the cases charging the defendant with felonious incest and second degree rape, Case Nos. 83CRS645 and 83CRS1243, the judgments to run consecutively, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant, appellant.

HEDRICK, Judge.

Defendant assigns error to the denial of his motions to dismiss the charges against him in the cases wherein he was charged with second degree rape. The evidence with respect to the rape charges, considered in the light most favorable to the State, tends to show the following: Defendant, his three daughters, and his son moved to North Carolina in 1981 and at the time of the offenses in question lived in Dobson, North Carolina. Defendant and the children's mother were divorced several years ago, and defendant obtained custody of the children. Prior to the divorce, defendant frequently beat Mrs. Lester, once striking her in the children's presence with such force that her false teeth were knocked out. Defendant's girl friend and his son were also beaten by defendant. Defendant possessed a gun and on one occasion pointed the

State v. Lester

gun at his children. Defendant has engaged in sexual activity with all of his daughters. The victim in the instant case was eleven years old when defendant first had sexual relations with her. When Mrs. Lester, defendant's ex-wife, learned of this and confronted defendant with her knowledge, defendant placed his hand on a Bible and swore never to touch the victim again. Defendant then threatened to kill Mrs. Lester and the victim if they told anyone of his actions.

The incident described in Case No. 83CRS1244 occurred on 25 November 1982. The victim testified that on that date she and her family went to the home of defendant's mother for Thanksgiving dinner. After dinner, defendant asked her to go with him to a local store, and she agreed to go. Defendant and his daughter did not go to the store, however, but returned instead to the trailer in which they lived. Defendant then told the victim to remove her clothes. She initially refused, but complied with a second request because she "could tell on his face that he was getting angrier." Defendant then removed his clothes and had intercourse with the victim.

The incident described in Case No. 83CRS1243 occurred on 18 December 1982. On that date the victim and defendant stopped on a gravel road on their way home from Christmas shopping. Defendant asked his daughter "once or twice" if she wanted "to do it," and she answered that she did not. He then told her to take off her pants and panties, and the victim refused. When she perceived that her father was angry, however, the victim "finally gave in," undressed, and lay down in the seat of the car in compliance with her father's directions. Defendant then had intercourse with her. Following this act, defendant accused the victim of "messing with other boys," became angry, and slapped her.

Defendant, citing *State v. Ricks*, 34 N.C. App. 734, 239 S.E. 2d 602 (1977), *disc. rev. denied*, 294 N.C. 363, 242 S.E. 2d 633 (1978), argues that the record is devoid of any evidence sufficient to raise an inference that he had sexual intercourse with the victim "by force," as is required by N.C. Gen. Stat. Sec. 14-27.3 to support a conviction of second degree rape. Citing no authority and without elaborating on the facts and circumstances giving rise to its fallacious conclusion, the State cavalierly dismisses the defendant's contentions with the following statement: "[T]he

State v. Lester

evidence is so overwhelming and stems from so many different sources, that the State is surprised this issue was even raised on appeal."

State v. Ricks is clearly distinguishable on its facts from the instant case, but we find *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984), not cited by either party, to be controlling on the issue of whether there was evidence that defendant had sexual intercourse with the victim "[b]y force and against [her] will." G.S. 14-27.3.

In *Alston* the defendant and his girl friend had been involved in a consensual sexual relationship for approximately six months. During this period defendant had struck her on several occasions. Approximately one month prior to the alleged offense, defendant's girl friend, Ms. Brown, moved out of defendant's apartment and decided to terminate her relationship with the defendant. On 15 June 1981, defendant met Ms. Brown outside the school she was attending, grabbed her arm, and stated that she was going with him. Ms. Brown agreed to accompany defendant if he released her arm, and he did so. Ms. Brown testified that she did not run away because she was afraid of the defendant. Defendant and Ms. Brown then walked around the school and talked about their relationship. At one point in the conversation the defendant threatened to "fix" Ms. Brown's face. Defendant then told Ms. Brown that he had the right to make love to her again, and the two went to the house of a friend, where they had had sexual relations on prior occasions. Defendant then asked Ms. Brown if she was "ready." She answered that she did not want to have sexual relations with the defendant, but did not physically resist his advances. Ms. Brown cried while she and defendant had intercourse. In reversing defendant's conviction of second degree rape, our Supreme Court stated:

[W]e think that the State's evidence was sufficient to show that the act of sexual intercourse in question was against Brown's will. It was not sufficient, however, to show that the act was accomplished by actual force or by a threat to use force unless she submitted to sexual intercourse.

Id. at 409, 312 S.E. 2d at 476. The Court explained its ruling in the following language:

State v. Lester

[T]he absence of an explicit threat is not determinative in considering whether there was sufficient force in whatever form to overcome the will of the victim. It is enough if the totality of the circumstances gives rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual intercourse. . . . Under the peculiar facts of this case, there was no substantial evidence that threats or force by the defendant on June 15 were sufficiently related to sexual conduct to cause Brown to believe that she had to submit to sexual intercourse with him or suffer harm. Although Brown's general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape.

Id. (Emphasis original.)

In the instant case there is evidence that the acts of sexual intercourse between defendant and his fifteen-year-old daughter on 25 November and 18 December, 1982, were against her will. There is no evidence, however, that defendant used either actual or constructive force to accomplish the acts with which he is charged. As *Alston* makes clear, the victim's fear of defendant, however justified by his previous conduct, is insufficient to show that defendant *forcibly* raped his daughter on 25 November and 18 December. Consequently, the judgments entered in Case Nos. 83CRS1244 and 83CRS1243, wherein defendant was convicted of two counts of second degree rape, must be vacated.

Having so disposed of the cases wherein defendant was charged with second degree rape, we consider defendant's remaining assignments of error only in connection with the cases wherein he was charged with incest. We have carefully examined these assignments of error, all of which relate to the admission or exclusion of evidence, and find each to be without merit.

The result is: In Case Nos. 83CRS1243 and 83CRS1244, wherein defendant was charged with second degree rape, the orders denying defendant's motions to dismiss are reversed, and the judgments entered on the verdicts thereon will be vacated; in

State v. Lester

Case Nos. 83CRS645 and 83CRS1469, wherein defendant was charged with and found guilty of felonious incest, we hold defendant had a fair trial, free from prejudicial error. Since the trial court consolidated Case Nos. 83CRS645 and 83CRS1243, wherein defendant was charged with incest and second degree rape, and consolidated Case Nos. 83CRS1469 and 83CRS1244, wherein defendant was charged in additional cases with incest and second degree rape, Case Nos. 83CRS645 and 83CRS1469, charging defendant with incest, must be remanded for resentencing without a new sentencing hearing.

Vacated in part, no error in part, and remanded for resentencing.

Judge BECTON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I dissent from the holding of the majority that the evidence presented was not sufficient to support defendant's conviction on the rape charge. Two significant circumstances in this case, which were not present in *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984), where the victim was defendant's independently situated former girl friend who followed him to their accustomed rendezvous place, are that the child was under defendant's constant and continuing control and dominion, and the incident occurred where they lived. The first of these circumstances, it seems to me, is a foundation which supports the other evidentiary circumstances and enables them to support each other, and when the jury considered his many cruelties and threats from that base, they were justified, I think, in concluding that the girl submitted to defendant out of fear. In the situation that existed, the threat of force, though implicit, was constant, and having stated that she did not wish to submit, the circumstances did not require her to physically resist.

Register v. Administrative Office of the Courts

TIMOTHY EUGENE REGISTER v. ADMINISTRATIVE OFFICE OF THE
COURTS

No. 8310IC1161

(Filed 16 October 1984)

**State § 8.2— tort claim—negligence of State employee not proximate cause of
damages**

Plaintiff's damages from the revocation of his driver's license were not proximately caused by the negligence of an assistant clerk of court in reporting to the Department of Motor Vehicles that plaintiff had been convicted of driving under the influence when in fact he had pled guilty to careless and reckless driving where plaintiff had only a probationary license; a condition of probation required that plaintiff not be *charged* as a driver with any offense in which there was evidence of the consumption of an alcoholic beverage; plaintiff's probationary license was revoked for a violation of probation; and the evidence showed that plaintiff violated a probation condition by being charged with driving under the influence although he was only convicted of careless and reckless driving.

APPEAL by plaintiff from the decision and order of the North Carolina Industrial Commission. Decision filed 16 June 1983. Heard in the Court of Appeals 28 August 1984.

In this action plaintiff seeks recovery from the State under the State Tort Claims Act, G.S. 143-291 *et seq.*, for damages allegedly resulting from the negligent act of Virginia Way Lewallen, an employee of the Administrative Office of the Courts (AOC).

From the record before us it appears that the pertinent facts are as follows: Plaintiff was involved in a minor automobile accident on 22 August 1975 near Fayetteville in Cumberland County. Highway Patrolman M. D. Robertson investigated the accident. After observing plaintiff at the scene, Robertson suspected that he had been drinking, arrested him and charged him with public drunkenness. A routine check of plaintiff's driver's license with the North Carolina Department of Motor Vehicles (DMV) in Raleigh indicated that plaintiff's license had been revoked effective 17 November 1974. Robertson then charged plaintiff with driving while license revoked, possessing and displaying a driver's license knowing the same to be revoked, and driving under the influence of intoxicating liquor (DUI). Robertson immediately confiscated plaintiff's license.

Register v. Administrative Office of the Courts

The license that plaintiff was holding at the time had been issued to plaintiff as a probationary license. In 1968, plaintiff had been convicted of a third offense of DUI and his license had been permanently revoked. The probationary license was issued on 25 June 1974. The probation period was three years and the terms were as follows:

Not be convicted of moving traffic violations, in this State or in other states, which require or would require if committed in this State, the assignment of as many as 6 points during this probation agreement. Not be charged with public drunkenness or any other offense or involved in an accident, as a driver in any state in which there was evidence of the consumption of alcoholic beverage.

Violation of probation will result in a revocation for the same period as the remaining portion of the probation period.

The probation agreement was signed by plaintiff and dated 10 June 1974.

On 3 September 1974 plaintiff was arrested in Randolph County and charged with DUI. He refused to take the breathalyzer test and pursuant to the law then in effect his driver's license was automatically revoked for six months. G.S. 20-16.2(c). Plaintiff appealed this revocation, as provided in G.S. 20-16.2(d), and the revocation was rescinded on 8 October 1974.

Plaintiff was tried in the District Court on the DUI charge and found guilty on 15 January 1975. He appealed this verdict to Superior Court for a trial *de novo*. Plaintiff's first Superior Court trial ended in a mistrial on 2 April 1975. On 10 July 1975 plaintiff pleaded guilty to careless and reckless driving, and his prayer for judgment continued was granted upon payment of a \$100 fine and court costs.

The Clerk of Superior Court was required to furnish the DMV with information as to traffic offense convictions in the Superior Court or District Courts of the county. A standard form, designated DL-47, was provided for this purpose. This job was usually handled by Mrs. Lewallen (then Ms. Virginia Way), whose position was Assistant Clerk. In forwarding the required information regarding plaintiff's careless and reckless driving conviction,

Register v. Administrative Office of the Courts

Mrs. Lewallen erroneously indicated on a DL-47 form dated 18 July 1975 that he had been convicted of DUI, as charged.

On 7 November 1974 notice was mailed to plaintiff at a Hickory address that his license was revoked until 25 June 1977, the remainder of the probation period. The revocation was effective 17 November 1974. The stated reason for the revocation was that plaintiff had violated his probation, although the notice is not specific as to the nature of the violation. Because plaintiff did not then live in Hickory, he did not receive the 7 November notice of revocation.

Believing that his DMV record incorrectly showed his license to be revoked when it was checked by Patrolman Robertson on 22 August 1975, plaintiff instituted a civil action against the State to correct the record and to get his license back. On 28 July 1976 a consent judgment was entered in that proceeding under which it was agreed that the 7 November 1974 revocation of license would be rescinded, his driver's license would be restored, and the action for violating probation based on the events occurring on 3 September 1974 would be dismissed with prejudice. Pursuant thereto, the charges of driving while license revoked and possessing and displaying a driver's license knowing the same to be revoked, still pending in Cumberland County, were dismissed on the motion of the Assistant District Attorney. The public drunkenness charge was also dismissed; but plaintiff was convicted on the DUI charge.

In the present tort claim, plaintiff alleges that Mrs. Lewallen's mistake, the incorrect entry on the DL-47 form, was negligence and that this negligence resulted in the wrongful revocation of his license. Because of the wrongful revocation, so plaintiff alleges, he incurred expenses defending the criminal charges against him and prosecuting the civil action to recover his license, was assaulted and harassed by police, lost wages, and suffered mental anguish. The State responded, denying the material allegations of the claim and asserting that Mrs. Lewallen's negligence did not cause plaintiff's alleged injury in that plaintiff's license was then revoked for violating probation.

As provided for in the Tort Claims Act, the claim was heard by a Deputy Commissioner of the North Carolina Industrial Commission on 8 July 1982. Finding facts essentially as stated above,

Register v. Administrative Office of the Courts

the Deputy Commissioner concluded that plaintiff's alleged damages were not caused by Mrs. Lewallen's negligence and dismissed plaintiff's claim. Plaintiff appealed this decision to the Full Commission, which adopted the Deputy Commissioner's findings and affirmed the order dismissing plaintiff's claim. Plaintiff appealed to this Court.

Ottway Burton for plaintiff appellant.

Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

PHILLIPS, Judge.

The facts in this case are not in substantial dispute. The only question raised by plaintiff on appeal is whether the Industrial Commission erred in finding that plaintiff's alleged damages were not proximately caused by the negligence of AOC or its employee, Mrs. Lewallen, and concluding that he was not entitled to a recovery. We find no merit in plaintiff's contention and affirm the decision of the Full Commission.

In order for a person to recover under the State Tort Claims Act, it must be shown that a negligent act of a state employee, acting in the course of his or her employment, proximately caused the injuries or damages asserted. *Branch Banking & Trust Co. v. Wilson County Board of Education*, 251 N.C. 603, 111 S.E. 2d 844 (1960); G.S. 143-291. While it is not required that the state employee's negligence be the sole proximate cause of the injury complained of, it must be a proximate cause. *McGaha v. Smokey Mountain Stages, Inc.*, 263 N.C. 769, 140 S.E. 2d 355 (1965); *Branch Banking & Trust Co. v. Wilson County Board of Education*, *supra*. In reviewing the decision of the Industrial Commission, our consideration is limited to two questions: (1) whether the Commission's findings of fact are supported by competent evidence; and (2) whether the Commission's conclusions are supported by the findings of fact. *Mason v. N. C. State Highway Commission*, 273 N.C. 36, 159 S.E. 2d 574 (1968); *Tanner v. State Department of Correction*, 19 N.C. App. 689, 200 S.E. 2d 350 (1973).

In the instant case, the Commission found that plaintiff's license, at the time of his arrest on 22 August 1975, had been revoked for violation of his June, 1974 probation. The terms of that

Register v. Administrative Office of the Courts

probation, quoted in full above, included a requirement that plaintiff not be *charged* with any offense in which there was evidence of the consumption of alcoholic beverage. Documentary evidence in the record, as well as testimony from witnesses, shows that plaintiff was arrested on 3 September 1974 and charged with DUI. This alone was sufficient, under the terms of the probation, to justify the revocation of plaintiff's license for the remainder of the probation period. Notice of the revocation was mailed to plaintiff on 7 November 1974 and the revocation was in effect at the time of his Cumberland County arrest on 22 August 1975. That the revocation notice was sent to an address where plaintiff was not then residing is of no consequence; he signed the probation agreement and must be presumed to have been aware of its terms, and the revocation was not dependent upon plaintiff's receipt of the notice.

Anything that occurred regarding plaintiff's driver's license or his record at DMV after he was charged with DUI on 3 September 1974, even the fact that he was ultimately not convicted of that offense, is irrelevant here. The revocation was for a violation of probation and was effective as of 17 November 1974. Thus, the fact that plaintiff's record, as of 22 August 1975, indicated that his license was revoked on 17 November 1974 was not the result of Mrs. Lewallen's negligent mistake, which occurred on 18 July 1975. Any alleged damages flowing from the confiscation of plaintiff's license by Patrolman Robertson were not proximately caused by Mrs. Lewallen's error and the Industrial Commission so found.

Notwithstanding the subsequent rescission of the revocation, the restoration of plaintiff's license and the fact that three of the four charges lodged against him on 22 August 1975 were dropped, the evidence supports the Commission's findings. Since that is the case, the findings are conclusive. *Bailey v. N. C. Department of Mental Health*, 272 N.C. 680, 159 S.E. 2d 28 (1968). And since proximate cause is an essential element of a negligence claim and the Industrial Commission could not find that plaintiff's alleged damages were proximately caused by Mrs. Lewallen's negligence, the conclusion that plaintiff is entitled to no recovery was proper. Therefore, the decision and order of the Industrial Commission dismissing plaintiff's claim must be affirmed.

Strickland v. A & C Mobile Homes

Affirmed.

Judges WEBB and JOHNSON concur.

JOHN STRICKLAND AND JEANNETTE STRICKLAND v. A & C MOBILE HOMES, A PARTNERSHIP, AND JIMMY NORTON, BOTH INDIVIDUALLY AND AS AGENT FOR A & C MOBILE HOMES

No. 8312SC1122

(Filed 16 October 1984)

1. Unfair Competition § 1— misrepresentation during sale—evidence sufficient

The trial court erred in holding that there was no unfair or deceptive trade practice where there was evidence that defendants had represented to plaintiffs that the military would pay all moving expenses for a mobile home; that the representation was false; that plaintiffs reasonably relied on the representation and on defendants' expertise, despite plaintiffs' knowledge of military moving regulations and access to army moving policy; and where the jury had found facts based on this evidence. G.S. Chapter 75.

2. Unfair Competition § 1— damages—benefit of the bargain rule applies

In an unfair trade practice case, the benefit of the bargain rule applies to damages, so that it was error to consider expenses plaintiffs would have had if the representation had been true, or to consider speculative evidence of a deficiency on a mortgage debt.

APPEAL by plaintiffs and defendants from *Farmer, Judge*. Judgment entered 25 May 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 August 1984.

This case arose from the purchase by the plaintiffs of a mobile home from A & C Mobile Homes of Fayetteville. The plaintiffs brought this action for fraud, praying for punitive damages, and for an unfair or deceptive trade practice. The evidence showed that in December 1981 the plaintiffs, a military couple, negotiated with the defendant Norton for the purchase of a mobile home from A & C Mobile Homes of Fayetteville. They informed Mr. Norton who was a partner in A & C Mobile Homes that they would purchase a mobile home only if the military paid the moving costs for the home if they moved. Mr. Norton assured them several times during the course of their conversation that the military would pay to move the mobile home. The Stricklands

Strickland v. A & C Mobile Homes

had moved six times during the time John Strickland had been in the army. He did not check with the army transportation office at Fort Bragg but the Stricklands relied on the statement of Mr. Norton in making the purchase. There was no evidence that Mr. Norton thought his representation was not true.

Several months later the plaintiffs moved to California. At that time they inquired at the army transportation office and were informed that in accordance with a formula used by the army it would pay \$5,103.00 of the total cost of \$8,836.64 for moving the mobile home to California. Plaintiffs were not able to pay the \$3,733.64 they would have had to pay to move the mobile home and they left it behind.

The Court granted the defendants' motion to dismiss as to punitive damages and the plaintiffs took a dismissal to its claim based on fraudulent misrepresentation. The jury found that the plaintiffs were induced to purchase the mobile home by the misrepresentation of the defendants and awarded the plaintiffs \$10,874.04 in damages. The Court found "that the acts complained of were not unfair and deceptive trade practices so as to warrant trebling of damages." The Court entered a judgment against the defendants for \$10,874.04.

Plaintiffs and defendants appealed.

Hedahl and Radtke, by Joan E. Hedahl for plaintiffs appellants and appellees.

Jordan, Brown, Price and Wall by R. Frank Gray for defendants appellants and appellees.

WEBB, Judge.

[1] Chapter 75 of the General Statutes establishes an action for "unfair or deceptive acts or practices in or affecting commerce." For a more detailed discussion of the elements of this type of action, see: *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981); *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980); and *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). The jury determines the facts and based on the jury's findings of fact the Court must determine as a matter of law whether the defendants engaged in an unfair or deceptive trade practice. If the Court was correct in its conclusion that the acts of the defendants did not

Strickland v. A & C Mobile Homes

constitute an unfair or deceptive trade practice it should have dismissed the action. The only question before it was whether the defendants had engaged in such practices and if they had not the plaintiffs had no claim. If they had engaged in an unfair or deceptive trade practice the Court had no choice but to treble the damages.

The defendants concede the sale of the mobile home affected commerce. The question is whether the representation to the plaintiff was unfair or deceptive. Our Supreme Court has held that good faith is not a defense when a defendant makes a deceptive statement on which the plaintiff relies. See *Marshall v. Miller, supra*. In this case there was evidence that Mr. Norton made a representation to the plaintiffs that the military would pay all moving expenses for the mobile home, which representation was false. There was also evidence that the plaintiffs relied on this representation in purchasing the mobile home. The jury found facts based on this evidence and it was error for the superior court to hold this did not constitute an unfair or deceptive trade practice.

The defendants argue that the plaintiffs had moved six times while John Strickland was in the army and he was familiar with army moving regulations. They also point out that he could have checked with the army transportation office before making the purchase, which he did not do. They contend that this evidence shows the plaintiffs had better access to information as to the moving policy of the army and the plaintiffs had no right to rely on the representations of the defendants. Mr. Norton's representations to the plaintiffs were categorical. He held himself out to the plaintiffs as an expert in the sale of mobile homes. It was reasonable for them to conclude that the information he gave them as to the policy of the army was correct.

[2] Although we hold that the verdict of the jury, which was supported by the evidence, establishes the defendants are liable for an unfair trade practice we hold there must be a new trial as to damages. This is so because the verdict as to damages is not supported by the evidence. In some unfair trade practice cases our courts have held the benefit of the bargain damage rule applies which entitles the plaintiff to be placed in the position he would have been in if the representation had been true. *Hardy v.*

Strickland v. A & C Mobile Homes

Toler, supra, and *Lee v. Payton*, 67 N.C. App. 480, 313 S.E. 2d 247 (1984). In *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E. 2d 582 (1984), the plaintiff traded his truck for a new one which did not operate properly. The plaintiff allowed the truck to be repossessed and sued for unfair or deceptive trade practices. This Court held that the plaintiff's damage should be measured by his restitution interest and that he was entitled to damages which would put him in the position in which he would have been had the trade not been made. In this case the plaintiffs kept the mobile home. We hold they were entitled to benefit of the bargain damages which would place them in the position in which they would have been if the representation would have been true.

Mrs. Strickland testified as to the difference in their mortgage payments and the rent they paid before purchasing the mobile home. She also testified as to the rent for the lot on which the mobile home was placed and to their increased utility bill, the cost of the telephone installation, the cost of new furniture, and a loss on the sale of a washing machine which the plaintiffs sold before moving to the new home. All these were expenses the plaintiffs would have had if the representation had been true. It was error to consider them as damages. She also testified that they intended to let the mobile home be repossessed and they had a liability on it of \$22,000.00. She also testified without objection that they had been informed by the mortgage company that it would wait until this litigation is complete before taking any action. We hold this evidence as to any deficiency on the mortgage debt is too speculative to be considered. The only evidence we can find in the record which supports damages to the plaintiffs is the \$3,733.64 the plaintiffs would have had to pay in addition to what the military would have paid to move the home. If the plaintiffs had received this they would be in the position in which they would have been had the representation been true. We do not discuss the question of whether the plaintiffs were entitled to consequential damages because there is no such evidence in the record.

We reverse and remand for a judgment holding that the actions of the defendants constituted an unfair or deceptive trade practice and a new trial as to damages.

Starkey v. Cimarron Apartments; Evans v. Cimarron Apartments

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

PEGGY STARKEY, PLAINTIFF v. CIMARRON APARTMENTS, INC.; A. G. TEXAFIL; CITY OF RALEIGH; HOLLAND CONSTRUCTION COMPANY, DEFENDANTS v. NORTH CAROLINA VILLAGES, INC.; THE LAKE JOHNSON COMPANY, A NORTH CAROLINA PARTNERSHIP, AND RANDALL BROACH, THIRD PARTY DEFENDANTS

HOWARD EVANS AND MARY WHITEHURST EVANS, PLAINTIFFS v. CIMARRON APARTMENTS, INC.; A. G. TEXAFIL; CITY OF RALEIGH; HOLLAND CONSTRUCTION COMPANY, DEFENDANTS v. NORTH CAROLINA VILLAGES, INC.; THE LAKE JOHNSON COMPANY, A NORTH CAROLINA PARTNERSHIP, AND RANDALL BROACH, THIRD PARTY DEFENDANTS

No. 8310SC1179

(Filed 16 October 1984)

1. Limitation of Actions § 4.2; Negligence § 20—condominium project—defects in construction—statute of repose—applicability to developer

The developer of a condominium project was involved in the "planning" of the project within the meaning of the 1963 version of G.S. 1-50(5) so that the six-year statute of repose set forth therein applied to actions against the developer for negligence in failing to install fire walls in the attics of the condominium buildings.

2. Damages § 17.7—punitive damages—insufficient evidence of wilful and wanton negligence

Evidence that defendant landlord knew an apartment building did not have attic fire walls and failed to correct this condition did not show wilful and wanton negligence which could support an award of punitive damages. Furthermore, plaintiffs failed to produce evidence sufficient to create a genuine issue of material fact as to wilful and wanton negligence by defendant landlord in wrongfully concealing the absence of the fire walls.

ON writ of certiorari to review orders entered by *Smith, Judge*. Judgment entered 19 August 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 30 August 1984.

The plaintiffs in this action are tenants of the Lake Johnson Mews Condominiums in Raleigh, whose property was damaged by a fire on 27 December 1980. The defendants include Cimarron

Starkey v. Cimarron Apartments; Evans v. Cimarron Apartments

Apartments, Inc., and Holland Construction Company, who developed and constructed the condominiums during the period July 1973 through 1 September 1974. A third defendant is A. G. Texafil, who has owned the condominiums since 12 February 1980.

Fire originated in the apartment of Randall Broach, when an oil heater turned over on his back balcony. The fire spread to the plaintiffs' apartments, its movement apparently unimpeded because of the lack of fire walls.

The plaintiffs brought suit on 30 November 1982. They alleged that defendants Cimarron Apartments and Holland Construction Company were negligent, and wilfully and wantonly negligent, in failing to install the fire walls. They alleged further that the defendant A. G. Texafil was wilfully and wantonly negligent in failing to install the fire walls and in wrongfully concealing them. The plaintiffs amended their complaint on 20 June 1983 to add a fourth cause of action, alleging that A. G. Texafil violated the North Carolina Building Code and its rental agreement with plaintiffs by failing to install the fire walls.

The defendants Cimarron Apartments and Holland Construction Company moved for summary judgment on the claims against them, and this was allowed on 12 August 1983. The defendant A. G. Texafil moved to dismiss the plaintiffs' second cause of action, and the trial judge allowed the motion, treating it as a motion for summary judgment. While the fourth cause of action is still alive and the trial judge did not make the requisite finding under G.S. 1A-1, Rule 54(b) that there is no reason to delay appeal of its summary judgment orders, we choose nevertheless to treat the appeal as a petition for certiorari and will review the questions presented on their merits.

Holleman and Stam, by Paul Stam, Jr., for plaintiff-appellants.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by D. James Jones, Jr., for defendant-appellees Cimarron Apartments, Inc., and Holland Construction Company.

Kirby, Wallace, Creech, Sarda & Zaytoun, by David F. Kirby and John R. Wallace, for defendant-appellee A. G. Texafil.

Starkey v. Cimarron Apartments; Evans v. Cimarron Apartments

ARNOLD, Judge.

Our determination of the plaintiffs' appeal of the summary judgment granted to defendants Cimarron Apartments, Inc., and Holland Construction Company is controlled by our decision in *Colony Hill Condominium I Association v. Colony Company* (No. 8314SC1071), filed 18 September 1984.

[1] Plaintiffs argue that Cimarron Apartments, as developer of the Lake Johnson Mews complex, was not covered by the 1963 statute of repose. The statute applied to "any person performing or furnishing the design, *planning*, supervision of construction or construction of such improvement to real property. . . ." G.S. 1-50(5) (emphasis added). As developer of the Lake Johnson Mews projects, Cimarron Apartments was involved in the "planning" of the project, if not also in the ultimate supervision of construction. We find that the 1963 statute of repose was intended to cover developers such as Cimarron Apartments.

Plaintiffs argue further that we should revert to an interpretation of the word "person" in the second sentence of the 1963 version of the statute of repose G.S. 1-50(5), espoused in two cases, *Sellers v. Friedrich Refrigerators, Inc.*, 283 N.C. 79, 194 S.E. 2d 817 (1973) and *Feibus & Co., Inc. v. Godley Construction Co., Inc.*, 301 N.C. 294, 271 S.E. 2d 385 (1980). The Supreme Court revised its interpretation of the 1963 statute in *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983), effectively overruling both *Sellers* and *Feibus*. We believe that the *Lamb* decision contains the correct interpretation of the legislature's intent in enacting the 1963 version of G.S. 1-50(5), and this interpretation must govern the facts of this case. We have seen nothing to indicate that the legislature accepted the *Sellers* and *Feibus* analysis, and that it enacted the 1981 amendment with that in mind. The suit brought against Cimarron Apartments and Holland Construction is accordingly barred.

[2] As to the appeal of the order of summary judgment granted defendant A. G. Texafil on plaintiffs' second cause of action, we find that Texafil's imputed knowledge of the lack of fire walls, and its failure to correct this deficiency, were evidence of negligence, see *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982), but not of wilful and wanton negligence. Plaintiffs have not produced evidence that Texafil or its agents had a deliberate pur-

McDowell v. Smathers Super Market

pose to fail to install the fire walls as required by law, nor have they shown any evidence of recklessness or of a "wicked purpose" which would make Texafil's negligence wilful or wanton. *See Siders v. Gibbs*, 39 N.C. App. 183, 249 S.E. 2d 858 (1978).

Moreover, plaintiffs have not produced evidence sufficient to create a genuine issue of material fact as to their claim that defendant Texafil wrongfully concealed the lack of fire walls. The fact that Texafil's predecessors failed to construct attic entries for the individual condominiums, that Texafil on purchasing the complex did not cause them to be constructed, and that an agent of Texafil had observed that the fire walls and attic entries were absent, is not evidence of actual knowledge on the part of Texafil that fire walls were missing and that, by failing to construct the individual attic entries, Texafil intended to conceal the fire walls. The trial judge's orders allowing summary judgment are

Affirmed.

Judges WHICHARD and EAGLES concur.

JOYCE SMATHERS McDOWELL v. SMATHERS SUPER MARKET, INC., AND
ROY H. PATTON, JR., AS EXECUTOR OF THE ESTATE OF MYRTLE MARIE
SMATHERS, DECEASED, AND CHARLES ROBERT SMATHERS

No. 8330SC1084

(Filed 16 October 1984)

1. Appeal and Error § 4— theory of trial in lower court—binding on appeal

The cast of a case on appeal is irretrievably fixed in the trial court; parties cannot try their cases on one theory and appeal them on another, so that defendant may not agree to the submission to the jury of issues concerning only the length of time a corporate resolution required salary payments after the death of a corporate officer, then raise the validity of the resolution on appeal.

2. Wills § 35— vesting of annuities—interpretation of corporate resolution

Where a corporate resolution required the payment of the corporate president's salary "... for a period of two years, said salary to be paid to his widow or if then deceased to his issue," the entire amount vested in the widow because she was not "then deceased" at her husband's death. The unpaid portion of the salary at the widow's death passed under the residuary clause of the widow's will, which named only one of the two children as legatee.

McDowell v. Smathers Super Market

APPEAL by defendants Smathers Super Market, Inc. and Charles Robert Smathers from *Kirby, Judge*. Judgment entered 28 April 1983 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 21 August 1984.

In this civil action plaintiff, as residuary beneficiary under the will of her mother, Myrtle Marie Smathers, sued to enforce a resolution that the defendant Smathers Super Market, Inc. adopted on the 9th day of March 1978. For a number of years prior thereto C. Underwood Smathers and his brother Loranzo F. Smathers had been the corporation's principal employees and its only directors, officers and shareholders. C. Underwood Smathers was the husband of Myrtle Marie Smathers; plaintiff and defendant, Charles Robert Smathers, are their only children. The resolution involved was as follows:

BE IT RESOLVED, that upon the death of C. Underwood Smathers, President, Director and highly valued employee, the corporation shall pay his salary (\$25,000 per year) for a period of two years, said salary to be paid to his widow or if then deceased to his issue in the same manner as his salary is now being paid.

An identical resolution was adopted at the same time with respect to the company Secretary-Treasurer, Loranzo F. Smathers.

Following the death of C. Underwood Smathers on July 4, 1978, his bi-weekly salary was routinely and regularly paid by the company to his widow, Myrtle Marie Smathers, until she died on July 8, 1979, but the company made no payments thereafter. The payments made to Mrs. Smathers amounted to \$24,000.

Myrtle Marie Smathers left a will, which did not mention the payments allegedly due her from the corporation, and as residuary legatee under the will plaintiff requested the executor to sue the company for the remaining \$26,000. When the executor refused plaintiff sued in her own right, joining the executor as a nominal party defendant. In the complaint, plaintiff alleged, in substance, that the salary payment resolutions were funded with insurance policies on the lives of the two corporate officers, the resolution required the defendant corporation to pay Mrs. Smathers, as her husband's survivor, for two years, and she was entitled to receive the payments under her mother's will. By their

McDowell v. Smathers Super Market

answers the defendant corporation denied owing plaintiff the payments and the defendant executor denied any interest in, or responsibility for, the dispute. Thereafter, while considering other matters irrelevant to this appeal, the court on its own motion ordered that plaintiff's brother, Charles Robert Smathers, be made a party to the suit and directed that he align himself with one side or the other. In answering the amended complaint, Charles Robert Smathers aligned himself with the defendant corporation, alleging that it owed no further payments, but that if it did he is entitled to half, along with plaintiff, as an issue of C. Underwood Smathers. Upon the trial of the case, the jury answered the issues submitted for the plaintiff, and from the judgment entered thereon the defendants Smathers Super Market, Inc. and Charles Robert Smathers appealed.

Adams, Hendon, Carson & Crow, by Geo. Ward Hendon, for plaintiff appellee.

Erwin, Winner & Smathers, by Patrick U. Smathers, for defendant appellants Smathers Super Market, Inc. and Charles Robert Smathers.

PHILLIPS, Judge.

[1] The main basis for this appeal is the contention that the salary payments called for were gifts, and the corporate resolution sued on was therefore without consideration and legally unenforceable. From that base and for that reason both defendant appellants contend that the court erred in several respects, including denying their motions for a directed verdict and judgment notwithstanding the verdict, and requiring the defendant corporation to pay interest on the remaining salary payments from the time that they were due. But that is not the position that the defendant appellants took in the trial court. The position that both defendants took, through nearly identical pleadings, was that the corporation *intended* to make the payments only to the officer's widow while she was living, and that if, because of ambiguous wording, the resolution failed to so provide, it should be reformed accordingly. Thus, the validity of the resolution, if not conceded, was not questioned in the trial court; the only issue raised about it was the length of time it required the company to pay the salary of Mr. Smathers following his death. Pursuant to

McDowell v. Smathers Super Market

these allegations of the defendant appellants, and with their agreement so the record states, the following issues were submitted to the jury:

1. Did the Smathers Super Market, Inc., intend in the March 9, 1978, resolution that the payments subsequently made to Underwood Smathers' widow be continued at her death until the balance of \$50,000 is paid?

2. Did the Smathers Super Market, Inc., through its Board of Directors, provide that the salary payable to the surviving widow, Myrtle Marie Smathers, should cease upon her death, without regard to the language appearing in the written resolution?

The jury answered the first issue *yes* and the second issue *no*, thereby finding that the corporation intended to pay the salary of Mr. Smathers for two years, notwithstanding the death of his widow during that period, and that its resolution so provides. Since the parties agreed to these issues, the record, of course, contains no request by the defendant appellants that an issue as to consideration be submitted or that the jury be instructed with respect to it. As has been stated by our Supreme Court many times, the cast of a case on appeal is irretrievably fixed in the trial court; parties cannot try their cases on one theory and appeal them on another. *Mills v. Dunk*, 263 N.C. 742, 140 S.E. 2d 358 (1965). Since the appellants tried their case on issues that they, themselves, raised and agreed to, they cannot now claim with success that the court erred in permitting them to do so. The judgment entered—for the unpaid salary in the amount of \$26,000, together with interest thereon from the time the payments were due—was the only one that could have been properly entered in the setting that the case was tried, and will not be disturbed. The jury established that the company owed \$50,000 to start with, the parties agreed that only \$24,000 had been paid, and debts arising out of contract, as in this case, bear interest in this state. G.S. 24-5; *Security National Bank v. Travelers Insurance Company*, 209 N.C. 17, 182 S.E. 702 (1935).

[2] The further alternative contention of the defendant Charles Robert Smathers that the corporate resolution entitles him, as an issue of C. Underwood Smathers, to one-half of the remaining salary owed by the company is likewise without merit. In deter-

State v. McRae

mining the legal questions raised by the verdict and entering judgment on it, the trial judge ruled that the right to receive the remaining salary payments was vested in Myrtle Marie Smathers at her death and thus passed to plaintiff under the residuary provisions of her will. We believe this ruling was correct. Certainly, the company's obligation to pay the full \$50,000 became absolute at Mr. Smathers' death; and as we read the resolution it required the company to pay the \$50,000 to Mrs. Smathers if she was not "then deceased," which she was not. That all the money was not to be disbursed then, but was spread over a two-year period, only delayed her enjoyment of the money and did not affect her right to receive it.

No error.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY McRAE

No. 8414SC3

(Filed 16 October 1984)

1. Criminal Law § 138— absence of proper sentencing hearing

The trial court failed to afford defendant a proper sentencing hearing pursuant to G.S. 15A-1334 where the court told defense counsel a month before the hearing that he intended to give defendant the same sentence of 40 years which he had given to a codefendant, the court repeated this intention when defendant and his attorney appeared in court for the sentencing, and defendant's attorney advised the court that in light of what had transpired, any remarks he would make would be extraneous and he would simply let the court render judgment.

2. Criminal Law § 134.4— youthful offender—failure to make no benefit finding

Where defendant was twenty years old at the time of his conviction, the trial court erred in failing either to sentence defendant as a committed youthful offender or to find in the record that he would not benefit from such a commitment. G.S. 15A-1340.4(a).

APPEAL by defendant from *Godwin, Judge*. Judgment entered 13 March 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 20 September 1984.

State v. McRae

Defendant and a co-defendant were convicted of second degree rape. The co-defendant was sentenced to forty years imprisonment at a time earlier than the defendant. Defendant's attorney became ill. Thereafter the trial judge sent defendant's attorney in the hospital a note stating that he intended to give defendant the same sentence he gave to the co-defendant. One month later when defendant and his attorney appeared in court the judge repeated his intention to impose the same sentence. Defendant's attorney acknowledged receipt of the proposed sentence and advised the court that in light of what had transpired any remarks he would have would be extraneous and he would simply let the judge render judgment. The judge imposed judgment of forty years and defendant gave notice of appeal.

Attorney General Rufus L. Edmisten, by Associate Attorney General Edmond W. Caldwell, Jr. for the State.

Assistant Appellate Defender Malcolm Ray Hunter, Jr. for defendant appellant.

HILL, Judge.

Defendant's assignments of error relate to his sentencing. Defendant contends he is entitled to a new sentencing hearing because (1) his original sentence was imposed in violation of G.S. 15A-1334, the defendant's right to due process of law, his right to counsel, as guaranteed by the sixth and fourteenth amendments to the United States Constitution and Article I, § 19 of the Constitution of the State of North Carolina; and (2) the court erred in failing to sentence him as a committed youthful offender under G.S. 15A-1340.4(a) or find on the record that he would not benefit from such a commitment. We concur under both assignments, vacate the sentence, and remand the case to the trial court with instructions that it conduct a sentencing hearing and impose such sentence as may be proper under the law.

[1] 1. G.S. 15A-1334. G.S. 15A-1334 provides in pertinent part as follows:

(a) Time of Hearing.—Unless the defendant waives the hearing, the court must hold a hearing on the sentence. Either the defendant or the State may, upon a showing which the judge determines to be good cause, obtain a continuance of the sentencing hearing.

State v. McRae

(b) Proceeding at Hearing.—The defendant at the hearing may make a statement in his own behalf. The defendant and prosecutor may present witnesses and arguments on facts relevant to the sentencing decision and may cross-examine the other party's witnesses. No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court. Formal rules of evidence do not apply at the hearing.

It is clear that G.S. 15A-1334, while permitting a defendant to speak at the sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf. *State v. Poole*, 305 N.C. 308, 289 S.E. 2d 335 (1982); *State v. Griffin*, 57 N.C. App. 684, 292 S.E. 2d 156, cert. denied, 306 N.C. 560, 294 S.E. 2d 373 (1982). However, it should be noted that we are not dealing here with the mere failure to issue an invitation to defendant to speak personally on his own behalf prior to sentencing. It is apparent from the facts that the trial court had decided the defendant's sentence a month prior to the date of the sentencing hearing held for defendant. By his actions the trial judge foreclosed any real opportunity for defendant or his counsel to present testimony relevant to the sentencing hearing, and in effect, frustrated the purpose of the Fair Sentencing Act which is to impose punishment commensurate with the injury created, taking into account factors which diminish or increase the offender's culpability. G.S. 15A-1340.3. Where the trial judge may have been uninformed as to relevant facts because of his failure to afford the defendant a proper sentencing hearing, which is a critical stage of a criminal proceeding, *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1967), we are restrained from saying defendant has not been prejudiced.

[2] 2. G.S. 15A-1340.4(a). Defendant was born 27 February 1959. He was 20 years old at the time of his conviction on 30 January 1980. He was sentenced on 13 March 1980, at which time he was 21 years old. The trial court failed to sentence the defendant as a committed youthful offender, or find on the record that he would not benefit from such a commitment.

G.S. 15A-1340.4(a) provides in pertinent part that

State v. Jackson

[i]f the convicted felon is under 21 years of age *at the time of conviction* and the sentencing judge elects to impose an active prison term, the judge must either sentence the felon as a committed youthful offender in accordance with Article 3B of Chapter 148 of the General Statutes and subject to the limit on the prison term provided by G.S. 148-49.14, or make a "no benefit" finding as provided by G.S. 148-49.14 and impose a regular prison term. (Emphasis added.)

The intent of the legislature to use age at the time of conviction as the determinative factor for eligibility for committed youthful offender status is clear. Because the defendant was 20 years old at the time of his conviction, and the court failed to sentence the defendant as a committed youthful offender or find in the record that he would not benefit from such commitment, defendant is entitled to a new sentencing hearing. See *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984). For this reason, and for those enunciated above, judgment of the trial court is vacated and the case is remanded to the superior court for a new sentencing hearing.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. JOE W. JACKSON

No. 8419SC47

(Filed 16 October 1984)

Criminal Law § 138—incest—aggravating factor—victim very young

In a prosecution for incest where the evidence showed that defendant pled guilty to one count of incest with his fifteen-year-old daughter, but that defendant's incestuous relationship with his daughter began when she was twelve years old, the evidence supported the trial court's finding in aggravation that the victim was very young. The Court recognized that (1) defendant took advantage of his daughter's relative helplessness to resist his sexual activities with her; (2) that a twelve to fifteen-year-old girl is vulnerable to sexual advances or solicitations from her father; and (3) the crime of incest between a father and a daughter of twelve to fifteen years of age will harm a girl of such age more than it would an adult woman. G.S. 15A-1340.4(a)(1)(j).

State v. Jackson

APPEAL by defendant from *Lamm, Charles C., Judge*. Judgment entered 22 August 1983 in RANDOLPH County Superior Court. Heard in the Court of Appeals 25 September 1984.

Defendant pled guilty to incest and was given a sentence of 6 years, from which he has appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Rion Brady for defendant.

WELLS, Judge.

Incest is a class G felony and carries a presumptive sentence of four and one-half years. N.C. Gen. Stat. § 14-178 (1981). In sentencing defendant, the trial court found one factor in mitigation, that defendant had no record of criminal conviction; found one factor in aggravation, that the victim was very young; found that the factor in aggravation outweighed the factor in mitigation; and sentenced defendant to a term of 6 years.

In his sole assignment of error, defendant contends that the trial court erred in finding as a factor in aggravation that the victim was very young. The evidence showed that defendant pled guilty to one count of incest with his 15-year-old daughter, but that defendant's incestuous relationship with his daughter began when she was 12 years old. In *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), our supreme court held that the factor in aggravation provided for in N.C. Gen. Stat. § 15A-1340.4(a)(1)(j) (1983), i.e., that "[t]he victim was very young, or very old, or mentally or physically infirm" recognizes that vulnerability to harm is the concern addressed in this factor. In *State v. Mitchell*, 62 N.C. App. 21, 302 S.E. 2d 265 (1983), this court took the position that the underlying policy of this factor in aggravation is to discourage wrongdoers from taking advantage of a victim because of the victim's young age, or old age, or infirmity. Compare *State v. Monk*, 63 N.C. App. 512, 305 S.E. 2d 755 (1983), where this court held that the age of the victim may not be used as an aggravating factor unless it appears that the defendant took advantage of the victim's relative helplessness to commit the crime or that the harm was worse because of the age of the victim.

Johnson v. N. C. Dept. of Transportation

We hold that the evidence in this case supports the trial court's finding of this factor in aggravation. In so holding, we recognize that (1) defendant took advantage of his daughter's relative helplessness to resist his sexual activities with her; (2) that a 12 to 15 year-old-girl is vulnerable to sexual advances or solicitations from her father; and (3) the crime of incest between a father and a daughter of 12 to 15 years of age will harm a girl of such age more than it would harm an adult woman.

Accordingly, we affirm defendant's sentence.

Affirmed.

Judges ARNOLD and HILL concur.

ODIS DELMA JOHNSON v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8310IC1253

(Filed 16 October 1984)

Appeal and Error § 6.6— dismissal of claim without prejudice—premature appeal

An Industrial Commission order which dismissed plaintiff's tort claim without prejudice so that plaintiff can file a new action based on the same claim within one year of the Commission's order is interlocutory and not immediately appealable.

APPEAL by defendant from the Industrial Commission. Order entered 29 August 1983. Heard in the Court of Appeals 21 September 1984.

This is an action under the State Tort Claims Act. The plaintiff filed an affidavit in which he alleged that the North Carolina Department of Transportation had sprayed chemicals on weeds along Interstate Highway 95, which chemical spray had drifted into his field and damaged his potato plants. A hearing was held before Deputy Commissioner Dianne C. Sellers who found that neither in the affidavit nor the evidence presented did the plaintiff set forth the name of the employee alleged to have been negligent which allegation is necessary to recover. She concluded that based on the pleadings and the evidence when viewed in the

Johnson v. N. C. Dept. of Transportation

light most favorable to the plaintiff the plaintiff was not entitled to recover. She ordered that the claim be dismissed.

The plaintiff appealed to the Full Commission which amended Deputy Commissioner Seller's order to provide that the claim be dismissed without prejudice so that the plaintiff could file a new action based on the same claim within one year of the Commission's order.

The defendant appealed.

Attorney General Edmisten, by Assistant Attorney General George W. Lennon for the defendant appellant.

Ben E. Roney, Jr., for plaintiff appellee.

WEBB, Judge.

We first consider the appealability of the order of the Industrial Commission. An appeal does not lie from an interlocutory order unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). The appellants argue first that this rule does not apply because the order of the Industrial Commission is a final judgment. The case was not remanded to the deputy commissioner and any further proceedings must be brought with new pleadings and a new docket number. The appellant contends that the case has been concluded and an appeal from the final judgment should be allowed. We believe that to hold that any claim brought on the same facts as were alleged in this case is a different case would be to exalt form over substance. If the plaintiff brings another action based on the same facts as those on which this case is based it will be a continuation of this case. That being so, the order of the Industrial Commission is not a final judgment disposing of the case.

If the order of the Industrial Commission is not a final judgment, the question is whether the defendant will suffer an injury if what it contends is the error of the Industrial Commission is not corrected before an appeal from a final judgment. We have held that the fact that a party must go through a trial before appealing from a pretrial order affecting a substantial right does

Johnson v. N. C. Dept. of Transportation

not give him the right to an immediate appeal. *State v. Jones*, 67 N.C. App. 413, 313 S.E. 2d 264 (1984). We can think of no injury to the defendant in this case if a new claim is filed other than having to try the case again if it is not now allowed to appeal. For this reason we hold that the appeal should be dismissed.

Appeal dismissed.

Judges BRASWELL and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 OCTOBER 1984

CLINE v. CLINE No. 8419SC344	Rowan (82CVD1338)	Dismissed
DAWES v. BRADLEY No. 8310DC1286	Wake (82CVD2734)	Affirmed
ELLER v. COCA-COLA CO. No. 8418SC292	Guilford (80CVS4115)	Appeal Dismissed
ELMWOOD v. ELMWOOD No. 8412DC464	Cumberland (67CVD925)	Affirmed
FREEMAN v. HUNTER & WALDEN CO. No. 8310IC1254	Industrial Commission (H-1402)	Affirmed
GERBER v. GERBER No. 8418DC412	Guilford (82CVD7596)	Affirmed
GRIFFIN v. HOUSING PROJECTS, INC. No. 8412DC532	Cumberland (81CVD1450)	Affirmed
IN RE FORECLOSURE OF DEED OF TANN No. 836SC1335	Northampton (83SP24)	Affirmed
IN RE WILKINSON v. NATIONAL SPINNING CO. No. 842SC502	Beaufort (83CVS657)	Affirmed
INSURANCE SERVICES v. INGRAM No. 8410SC448	Wake (84CVS1865)	Appeal Dismissed
LONG v. WILKINS No. 8421SC360	Forsyth (83CVS4604)	Affirmed
NORTHWESTERN BANK v. BROWNING No. 8414SC302	Durham (83CVS856)	Affirmed
STATE v. ALSTON No. 846SC538	Halifax (83CRS9467)	No Error
STATE v. BAKER No. 8410SC565	Wake (83CRS71762)	No Error
STATE v. BATES No. 8322SC1256	Davidson (83CRS3449)	Reversed

STATE v. CARTER & SPICER No. 8323SC1252	Wilkes (82CRS5540) (82CRS5541)	No Error
STATE v. CHAPMAN No. 8411SC340	Johnston (83CRS9045)	No Error
STATE v. DAVIS No. 845SC351	New Hanover (81CRS20737)	New Trial
STATE v. FEWELL No. 8426SC263	Mecklenburg (83CRS20694) (83CRS20695)	No Error
STATE v. FOWLER No. 8325SC1309	Catawba (83CRS6557)	No Error
STATE v. FREEMAN No. 8422SC92	Davie (83CRS2255) (83CRS2256) (83CRS2257) (83CRS2258) (83CRS2259) (83CRS2260) (83CRS2261) (83CRS2262) (83CRS2263)	Cole Freeman— No Error; David Freeman— No Error; Eddie Freeman— New Trial
STATE v. GARRISON No. 8422SC190	Davidson (83CRS2486)	No Error
STATE v. GILBERT No. 8427SC365	Gaston (83CRS10575)	No Error
STATE v. GOODING No. 848SC408	Lenoir (82CRS11093)	No Error
STATE v. HUBBARD No. 8412SC346	Cumberland (83CRS33548)	No Error
STATE v. JAMERSON No. 8427SC305	Cleveland (83CRS6688)	No Error
STATE v. JOHNSON No. 848SC573	Wayne (83CRS13489)	No Error
STATE v. LAWLA No. 8327SC1299	Cleveland (82CRS10448) (82CRS10536)	No Error
STATE v. LESLIE No. 844SC418	Onslow (83CRS17698)	Affirmed
STATE v. MASON No. 8421SC45	Forsyth (83CRS21310)	No Error

STATE v. MICHAEL No. 8418SC490	Guilford (83CRS15738)	No Error
STATE v. NOBLES No. 843SC319	Pitt (83CRS5048)	No Error
STATE v. ROBERTS No. 8419SC353	Rowan (83CRS11474)	No Error
STATE v. ROSENBERG No. 8324SC1241	Watauga (82CRS4490) (82CRS4491) (82CRS4521) (82CRS4522)	No Error
STATE v. SHOWELL No. 8411SC224	Harnett (83CR4262)	No Error
STATE v. SIMES No. 8421SC496	Forsyth (83CRS48050)	No Error
STATE v. SPENCE No. 848SC264	Wayne (83CRS9064)	No Error
STATE v. STINSON No. 8419SC320	Cabarrus (83CRS7601)	No Error
STATE v. TAYLOR No. 8419SC83	Cabarrus (83CRS4846)	No Error
STATE v. WARREN No. 843SC31	Pitt (83CRS3487)	No Error
STATE, EX REL. v. HINSON No. 843DC67	Craven (82CVD744)	Appeals Dismissed
WILSON v. BAGWELL No. 8411DC641	Johnston (83CVD1363)	Affirmed

APPENDIX

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 1, 6, 8, 9, 10, 11, 12, 13, 14, 21, 26, 27, 28, 31, and 32 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages.

The effective date for these amendments shall be 1 February 1985. However, the amendments to Rules 9, 10, 11, 12, and 14 shall be applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985; and Rule 26 shall be effective for documents filed on or after 1 February 1985.

Adopted by the Court in Conference this 27th day of November, 1984. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

BRANCH, C. J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 28th day of November, 1984.

J. GREGORY WALLACE
Clerk of the Supreme Court

RULE 1

SCOPE OF RULES: TRIAL TRIBUNAL DEFINED

- (a) **Scope of Rules.** These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.
- (b) **Rules Do Not Affect Jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.
- (c) **Definition of Trial Tribunal.** As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

Adopted: 13 June 1975.

Amended: 27 November 1984—1(a) and (c)—effective 1 February 1985.

RULE 6

SECURITY FOR COSTS ON APPEAL

- (a) **In Regular Course.** Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.
- (b) **In Forma Pauperis Appeals.** An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.
- (c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.
- (d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or

for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

- (e) **No Security for Costs in Criminal Appeals.** Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

Adopted: 13 June 1975.

Amended: 27 November 1984—6(e)—effective 1 February 1985.

RULE 8

STAY PENDING APPEAL

- (a) When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.
- (b) **Stay in Criminal Cases.** When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of G.S. 15A-1451. Stays of imprisonment or of the execu-

tion of death sentences must be pursued under G.S. 15A-536 or Appellate Rule 23, Writ of Supersedeas.

Adopted: 13 June 1975.

Amended: 27 November 1984—8(b)—effective 1 February 1985.

RULE 9

THE RECORD ON APPEAL

- (a) **Function; Composition of Record.** In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.
- (1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:
- (i) an index of the contents of the record, which shall appear as the first page thereof;
 - (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;
 - (iii) a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;
 - (iv) copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;
 - (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the entire verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;
 - (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

- (vii) copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;
 - (viii) a copy of the judgment, order, or other determination from which appeal is taken;
 - (ix) a copy of the notice of appeal, or of an appropriate entry showing appeal taken orally, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);
 - (x) copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and
 - (xi) exceptions and assignments of error set out in the manner provided in Rule 10.
- (2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:
- (i) an index of the contents of the record, which shall appear as the first page thereof;
 - (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;
 - (iii) a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;
 - (iv) copies of all petitions and other pleadings filed in the superior court;

- (v) copies of all items included in the record of administrative proceedings which were filed in the superior court for review; (formerly (vi))
 - (vi) so much of the evidence before the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed; (formerly (vii))
 - (vii) a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken; (formerly (v))
 - (viii) a copy of the notice of appeal from the superior court, or of an appropriate entry showing appeal taken orally, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and
 - (ix) exceptions and assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.
- (3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:
- (i) an index of the contents of the record, which shall appear as the first page thereof;
 - (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;
 - (iii) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;
 - (iv) copies of docket entries or a statement showing all arraignments and pleas;

- (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;
 - (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;
 - (vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken;
 - (viii) a copy of the notice of appeal, or of an appropriate entry showing appeal taken orally, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding defendant indigent for the purposes of the appeal and assigning counsel, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);
 - (ix) copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and
 - (x) exceptions and assignments of error set out in the manner provided in Rule 10.
- (b) **Form of Record; Amendments.** The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.
- (1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. (formerly (b)(4))
 - (2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party

or counsel who caused or permitted its inclusion. (formerly (b)(5))

- (3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature. (formerly (c)(3))
 - (4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p__)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p__)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal. (formerly (c)(4))
 - (5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the docketing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal. (formerly (b)(6))
- (c) **Presentation of Testimonial Evidence and Other Proceedings.** Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or in the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.
- (1) **When Testimonial Evidence Narrated—How Set Out in Record.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to

be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

- (2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire, jury instructions or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned.
- (3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):
- (i) it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;
 - (ii) appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on ap-

peal, with the clerk of the appellate court in which the appeal is docketed;

(iii) in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

(iv) the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(d) **Models, Diagrams, and Exhibits of Material.**

(1) **Exhibits.** Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) **Transmitting Exhibits.** Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit

the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

- (3) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;

12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;

27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 10

EXCEPTIONS AND ASSIGNMENTS OF ERROR IN RECORD ON APPEAL

- (a) **Function in Limiting Scope of Review.** Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out in the record on appeal or in the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2), and made the basis of assignments of error in the record on appeal in accordance

with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) Exceptions.

- (1) General.** Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal or in the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and made the basis of an assignment of error. Bills of exception are not required. Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of the grounds or argumentation, by any clear means of reference. Exceptions so set out shall be numbered consecutively in order of their occurrence.
- (2) Jury Instructions; Findings and Conclusions of Judge.** No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury. In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its

substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

- (3) **Sufficiency of the Evidence.** A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

- (c) **Assignments of Error—Form.** The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the record pages or transcript pages at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record or transcript of proceedings to which it is

directed, a proper listing of the exceptions upon which it is based being sufficient.

- (d) **Exceptions and Cross-Assignments of Error by Appellee.** Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

Adopted: 13 June 1975.

Amended: 10 June 1981—10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981;

7 July 1983—10(b)(3);

27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 11

SETTLING THE RECORD ON APPEAL

- (a) **By Agreement.** Within 60 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.
- (b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within 60 days after appeal is taken, file in the office of the clerk of superior court and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 15 days after service of the proposed record on appeal upon him an appellee may file in the office of the clerk of superior

court and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

- (c) **By Judicial Order or Appellant's Failure to Request Judicial Settlement.** Within 15 days after service upon him of appellant's proposed record on appeal, an appellee may file in the office of the clerk of superior court and serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

- (d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.
- (e) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

Adopted: 13 June 1975.

Amended: 27 November 1984—11(a), (c), (e), and (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 12

FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

- (a) **Time for Filing Record on Appeal.** Within 10 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.
- (b) **Docketing the Appeal.** At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter

the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

- (c) **Copies of Record on Appeal.** The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk. Upon prior agreement with the clerk, the appellant may file with the record on appeal a proposed printed record prepared in accordance with Rule 26 and the appendixes to these rules.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.

Adopted: 13 June 1975.

Amended: 27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 13

FILING AND SERVICE OF BRIEFS

- (a) **Time for Filing and Service.** Within 20 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 20 days for filing and serving the brief shall run from the date of docketing the record on appeal in the appellate court. Within 20 days after appellant's brief has been served on an

appellee, the appellee shall similarly file and serve copies of his brief.

- (b) **Copies Reproduced by Clerk.** A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.

- (c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Adopted: 13 June 1975.

Amended: 7 October 1980—13(a)—effective 1 January 1981;

27 November 1984—13(a) and (b)—effective 1 February 1985.

RULE 14

APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. 7A-30

- (a) **Notice of Appeal; Filing and Service.** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the peti-

tion for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) Content of Notice of Appeal.

(1) **Appeal Based Upon Dissent in Court of Appeals.** In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) **Appeal Presenting Constitutional Question.** In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) Record on Appeal.

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies.** Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will

forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) Briefs.

- (1) **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 20 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 20 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.

- (2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be

dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the Court.

Adopted: 13 June 1975.

Amended: 31 January 1977—14(d)(1);

7 October 1980—14(d)(1)—effective 1 January 1981;

27 November 1984—14(a), (b), and (d)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 21

CERTIORARI

(a) Scope of the Writ.

(1) **Review of the Judgments and Orders of Trial Tribunals.**

The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals.**

The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ; to Which Appellate Court Addressed.**

Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

- (c) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.
- (d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.
- (e) **Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.** Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

Adopted: 13 June 1975.

Amended: 18 November 1981—21(a) and (e);

27 November 1984—21(a)—effective 1 February 1985.

RULE 26

FILING AND SERVICE

- (a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk

of the appropriate court. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that proposed records on appeal and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

- (b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.
- (c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.
- (d) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.
- (e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.
- (f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon

the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

- (g) **Form of Papers; Copies.** Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8½ x 14"). Papers shall be prepared on white paper of 16-20 pound substance in pica type so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;

11 February 1982—26(c);

7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;

27 November 1984—26(a)—effective for documents filed on and after 1 February 1985.

RULE 27

COMPUTATION AND EXTENSION OF TIME

- (a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by

any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

- (b) **Additional Time After Service by Mail.** Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.
- (c) **Extensions of Time; By Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing prescribed by these rules or by law.
- (1) **Motions for Extension of Time in the Trial Division.** All motions for extensions of time not to exceed 150 days from the date the notice of appeal is given are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. No extension of time which runs beyond 150 days from the date the notice of appeal is given shall be granted by the trial tribunal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state; provided that motions to extend the time for serving the proposed record on appeal made after the expiration of any time previously allowed for such service must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard. Such motions may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of

those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division.**

All motions for extensions of time, including the time for filing the record on appeal, to a time greater than 150 days from the date the notice of appeal is given may only be made to the appellate court to which appeal has been taken. Any subsequent motion for any extension of time shall be made to the appellate court.

Adopted: 13 June 1975.

Amended: 7 March 1978—27(c);

4 October 1978—27(c)—effective 1 January 1979;

27 November 1984—27(a) and (c)—effective 1 February 1985.

RULE 28

BRIEFS: FUNCTION AND CONTENT

- (a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.
- (b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:
- (1) A table of contents and table of authorities required by Rule 26(g).

- (2) A statement of the questions presented for review.
- (3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.
- (4) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.
- (5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal, or the transcript of proceedings if one is filed pursuant to Rule 9(c)(2). Exceptions not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

- (6) A short conclusion stating the precise relief sought.
 - (7) Identification of counsel by signature, typed name, office address and telephone number.
 - (8) The proof of service required by Rule 26(d).
 - (9) The appendix required by Rule 28(d).
- (c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain a table of contents and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, state-

ment of the procedural history of the case, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee desires to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

- (i) those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;
- (ii) those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

- (i) whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

- (ii) to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or
 - (iii) to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).
- (3) **When Appendixes to Appellee's Brief Are Required.** Appellee must reproduce appendixes to his brief in the following circumstances:
- (i) Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.
 - (ii) Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.
- (4) **Format of Appendixes.** The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.
- (e) **References in Briefs to the Record.** References in the briefs to exceptions and assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.
- (f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

- (g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) **Reply Briefs.**

- (1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 20 days after service upon him of such brief, file and serve a reply brief limited to those new or additional questions presented in the appellee's brief.
 - (2) Except for a reply brief filed under Rule 28(h)(1), or unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court.
- (i) **Amicus Curiae Briefs.** A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the appeal is docketed. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the

Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. In all cases where amicus curiae briefs are permitted by a court, the clerk of the court at the direction of the court will notify all parties of the times within which they may file reply briefs. Such reply briefs will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

Adopted: 13 June 1975.

Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;

10 June 1981—28(b) and (c)—effective 1 October 1981;

12 January 1982—28(b)(4)—effective 15 March 1982;

7 December 1982—28(i)—effective 1 January 1983;

27 November 1984—28(b), (c), (d), (e), (g), and (h)—effective 1 February 1985.

RULE 31

PETITION FOR REHEARING

- (a) **Time for Filing; Content.** A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the

decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

- (b) **How Addressed; Filed.** A petition to the Supreme Court shall be addressed to the court. Two copies thereof shall be filed with the clerk.

A petition to the Court of Appeals shall be addressed to the court. Two copies thereof shall be filed with the clerk.

- (c) **How Determined.** Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.
- (d) **Procedure When Granted.** Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted, and if the court has ordered oral argument, shall give notice of the time set therefor, which time shall be not less than 30 days from the date of such notice. The case will be reconsidered solely upon the record on appeal, the petition to rehear, and new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 10 days after the clerk has given notice of the grant of the petition; and the opposing party's brief, within 20 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13.
- (e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.
- (f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Ap-

peals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

- (g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions.

Adopted: 13 June 1975.

Amended: 27 November 1984—31(a)—effective 1 February 1985.

RULE 32

MANDATES OF THE COURTS

- (a) **In General.** Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.
- (b) **Time of Issuance.** Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk.

Adopted: 13 June 1975.

Amended: 27 November 1984—32(b)—effective 1 February 1985.

ANALYTICAL INDEX



WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

- | | |
|---------------------------------|------------------------------|
| ACCORD AND SATISFACTION | FALSE PRETENSE |
| ACTIONS | FRAUD |
| ADMINISTRATIVE LAW | FRAUDULENT CONVEYANCES |
| APPEAL AND ERROR | HIGHWAYS AND CARTWAYS |
| APPEARANCE | HOMICIDE |
| ARBITRATION AND AWARD | INDICTMENT AND WARRANT |
| ARCHITECTS | INFANTS |
| ARSON | INSURANCE |
| ASSAULT AND BATTERY | JUDGMENTS |
| ASSIGNMENTS | JUDICIAL SALES |
| ATTORNEYS AT LAW | JURY |
| AUTOMOBILES | KIDNAPPING |
| BANKS AND BANKING | LANDLORD AND TENANT |
| BASTARDS | LARCENY |
| BROKERS AND FACTORS | LIMITATION OF ACTIONS |
| BURGLARY AND UNLAWFUL BREAKINGS | MASTER AND SERVANT |
| CANCELLATION AND | MORTGAGES AND DEEDS OF TRUST |
| RESCISSION OF INSTRUMENTS | MUNICIPAL CORPORATIONS |
| CONSTITUTIONAL LAW | NARCOTICS |
| CONTEMPT OF COURT | NEGLIGENCE |
| CONTRACTS | PARENT AND CHILD |
| CONTRIBUTION | PARTITION |
| CORPORATIONS | PAYMENT |
| COURTS | PHYSICIANS, SURGEONS, AND |
| CRIMINAL LAW | ALLIED PROFESSIONS |
| CUSTOMS AND USAGES | PLEADINGS |
| DAMAGES | PROCESS |
| DEATH | PROPERTY |
| DECLARATORY JUDGMENT ACT | PUBLIC OFFICERS |
| DIVORCE AND ALIMONY | QUASI CONTRACTS |
| EASEMENTS | AND RESTITUTION |
| EJECTMENT | QUIETING TITLE |
| ELECTRICITY | |
| ESTATES | |
| ESTOPPEL | |
| EVIDENCE | |
| EXECUTORS AND ADMINISTRATORS | |

RAILROADS
RAPE AND ALLIED
 OFFENSES
RECEIVING STOLEN GOODS
REGISTRATION
ROBBERY
RULES OF CIVIL
 PROCEDURE

SALES
SEALS

SEARCHES AND SEIZURES
STATE

TAXATION
TRESPASS
TRIAL

UNFAIR COMPETITION

WILLS
WITNESSES

ACCORD AND SATISFACTION**§ 1. Nature and Essentials of Agreement**

In an action to recover the balance due under a written construction contract, the trial court erred in entering summary judgment for defendant where a genuine issue of fact existed as to whether the parties intended a release to relate to work already performed and therefore monies indisputably due, or to relate to the termination of the parties' contract and settlement of plaintiff's entitlement to the full contract price. *Maintenance Service v. Construction Co.*, 49.

ACTIONS**§ 5. Where Plaintiff's Own Wrongful Act Constitutes Element of His Cause of Action**

The doctrine of in pari delicto barred plaintiff's claims against defendant stockbrokers for losses incurred from stock in insurance companies purchased upon alleged false representations by defendants that they had "inside information" concerning imminent takeovers of the two companies. *Skinner v. E. F. Hutton & Co.*, 517.

ADMINISTRATIVE LAW**§ 2. Exclusiveness of Statutory Remedy**

Defendant's eligibility for a zoning variance was not before the court on appeal where defendant failed to exhaust his administrative remedies. *Town of Kenansville v. Summerlin*, 601.

APPEAL AND ERROR**§ 2. Review of Decision of Lower Court**

A second panel of the Court of Appeals may not exercise its discretion to review an order of the trial division when a preceding panel has decided to the contrary. *Estrada v. Jaques*, 627.

§ 4. Theory of Trial in Lower Court

Since the affirmative defense that a car purchased by a minor was a necessity was not pleaded or effectively argued before the trial court at a hearing on a motion for summary judgment, it could not be raised for the first time on appeal. *Gillis v. Whitley's Discount Auto Sales*, 270.

Defendant may not agree to the submission to the jury of issues concerning only the length of time a corporate resolution required salary payments, then raise the validity of the resolution on appeal. *McDowell v. Smathers Super Market*, 775.

§ 6.2. Finality as Bearing on Appealability

The clerk of superior court correctly treated a voluntarily dismissed suit as a "claim" against an estate and acted within his authority in setting aside an order discharging petitioner as administrator. *In re Watson*, 120.

A motion to dismiss an appeal as being interlocutory is a matter for the appellate division and should be filed after the record on appeal is filed in the appellate court. *Estrada v. Jaques*, 627.

Although summary judgment orders disposing of informed consent claims against defendant surgeons failed to adjudicate negligence performance claims and were thus interlocutory, they affected a substantial right and were immediately appealable. *Ibid.*

APPEAL AND ERROR — Continued**§ 6.3. Appeals Based on Venue**

An order denying a change of venue was appealable. *DesMarais v. Dimmette*, 134.

§ 6.6. Appeals Based on Motions to Dismiss

An Industrial Commission order which dismissed plaintiff's tort claim without prejudice was interlocutory and not immediately appealable. *Johnson v. N. C. Dept. of Transportation*, 784.

§ 11. Agreements of Parties

Defendants did not waive their right to appeal an order awarding plaintiff attorney fees by signing a consent judgment which stated that all appeals were waived where the judgment expressly provided for further judicial proceedings to establish attorney fees. *Coastal Production v. Goodson Farms*, 221.

§ 14. Appeal and Appeal Entries

Defendant's notice of appeal given on 5 July 1983 was timely where the tenth day after entry of the order appealed from was a Sunday, and the next day, 4 July, was a legal holiday. *Hardy v. Floyd*, 608.

§ 16.1. Limitations on Powers of Trial Court after Appeal

The trial court lacked jurisdiction to dismiss plaintiff's appeal as to two defendants where the session had ended. *Estrada v. Jaques*, 627.

The trial court was not authorized by the second sentence on App. Rule 25 to dismiss an appeal as interlocutory. *Ibid.*

§ 42. Conclusiveness of Record

Appellant failed properly to preserve his objection to a pretrial order concerning sequestration of witnesses where he failed to include the order in the record. *Spencer v. Spencer*, 159.

The record did not permit a determination of whether the claims from which the action arose were against public policy and therefore uninsurable because the record did not include the complaint or any pleading from one case, and the complaint in the other did not reveal whether plaintiff would proceed on intentional or unintentional discrimination. *City of Greensboro v. Reserve Insurance Co.*, 651.

Respondent may not base a contention on comments by the trial judge that are not in the record, and a panel of the Court of Appeals may not review or reverse the denial of a petition for certiorari by a different panel. *Sloop v. Friberg*, 690.

§ 45. Form and Contents of Brief

Cross-assignments of error were not properly before the appellate court where appellee's brief failed to note any exceptions or assignments of error to the questions presented. *Brooks, Comr. of Labor v. Butler*, 681.

§ 62. New Trial in General

When the appellate court remanded the case for a new trial because of an error in the instructions with respect to contributory negligence, the trial court did not err in retrying the issue of defendant's negligence. *Watson v. Storie*, 327.

§ 62.1. Specific Instances where New Trial Will Be Granted

Where the trial court's findings are clearly inadequate, the appellate court may order a new trial rather than remand the case for further proceedings. *Waynick Construction v. York*, 287.

APPEARANCE**§ 2. Effect of Appearance**

Defendant made a general appearance which gave the court personal jurisdiction over her when she came into court and answered the charges made against her in a motion requesting that she be held in contempt. *Bethea v. McDonald*, 566.

ARBITRATION AND AWARD**§ 2. Agreements to Arbitrate as Bar to Action**

Defendant waived its contractual right to arbitration when it filed an answer and third party complaint for indemnity and submitted interrogatories to plaintiff. *Servomation Corp. v. Hickory Construction Co.*, 309.

ARCHITECTS**§ 3. Liability for Defective Conditions**

Plaintiff's action to recover for the alleged negligence of defendant architects in designing and inspecting a wall was barred by the statute of limitations. *Square D Co. v. C. J. Kern Contractors*, 30.

ARSON**§ 2. Indictment and Burden of Proof**

There was circumstantial evidence sufficient for the court to charge the jury that defendant could be found guilty where defendant had approached an acquaintance about burning his house and where defendant was within one and one-quarter miles of his residence at the time of the fire. *S. v. Hicks*, 611.

§ 4.1. Sufficiency of Evidence

There was sufficient evidence of defendant's burning or procuring another to burn his dwelling in violation of G.S. 14-65 to submit the charge to the jury. *S. v. Hicks*, 611.

ASSAULT AND BATTERY**§ 15.7. Instruction on Self-Defense Not Required**

In a prosecution for assault with a deadly weapon inflicting serious injury, defendant was not entitled to an instruction on self-defense. *S. v. McGinnis*, 421.

§ 16.1. Submission of Lesser Included Offenses Not Required

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury, the trial court did not err in refusing to instruct on the lesser included offense of assault with a deadly weapon with intent to kill. *S. v. Grier*, 40.

ASSIGNMENTS**§ 1. Rights and Interests Assignable**

Purported assignments of claims to recover for injuries allegedly caused by defendant's negligence were void as against public policy. *Southern Railway Co. v. O'Boyle Tank Lines*, 1.

ATTORNEYS AT LAW

§ 7.1. Validity of Contingent Fee Contracts

A contingent fee contract in a domestic relations case was void as against public policy, but plaintiff attorneys were entitled to recover in *quantum meruit* for the reasonable value of their services. *Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson*, 147.

§ 7.4. Fees Based on Provisions of Notes or Other Instruments

In an action to recover an amount allegedly due on a promissory note executed by defendants, the trial court erred in entering summary judgment awarding plaintiffs attorneys' fees since defendants did not receive notice of plaintiffs' intent to collect attorneys' fees. *Blanton v. Sisk*, 70.

Defendants did not waive their right to appeal an order awarding plaintiff attorney fees by signing a consent judgment which stated that all appeals were waived where the judgment expressly provided for further judicial proceedings to establish attorney fees. *Coastal Production v. Goodson Farms*, 221.

Defendants received sufficient notice of plaintiff's intention to enforce the attorney fee provisions of a promissory note where they signed a consent judgment providing that if they defaulted in their promised compliance with its payment terms, they would submit to a judgment for attorney fees. *Ibid.*

When other actions are reasonably related to the collection of the underlying note sued upon, attorney fees incurred therein may be properly awarded under G.S. 6-21.2. *Ibid.*

Language in a promissory note requiring the debtors to pay a "reasonable attorney's fee of not less than ten per centum of the total amount due hereon" specified a specific percentage within the meaning of G.S. 6-21.2(1), and the note and statute combined to set a range of reasonable attorney fees between 10% and 15%. *Ibid.*

The trial court erred in awarding an additional amount as an attorney fee "because of the nature, complexity, responsibility and timeliness with which plaintiff's attorney represented his client." *Ibid.*

§ 7.5. Allowance of Fees as Part of Costs

The trial court properly awarded an attorney's fee in an action where defendant insurer made an unwarranted refusal to pay. *McDaniel v. N. C. Mutual Life Ins. Co.*, 480.

AUTOMOBILES

§ 2. Grounds for Mandatory Revocation of License

Where plaintiff's estranged husband damaged her vehicles, plaintiff obtained a judgment against her husband for the damages, and the judgment remained unsatisfied for longer than 60 days, defendant was required to suspend the husband's driver's license upon plaintiff's request. *Wilfong v. Wilkins, Com'r of Motor Vehicles*, 127.

§ 61. Sufficiency of Evidence of Negligence in Backing

Plaintiff's complaint gave defendants sufficient notice of an allegation of negligence in failing to maintain a functional back-up bell on their garbage truck. *Briggs v. Morgan*, 57.

The trial court erred in excluding evidence of industry custom and defendant town's own voluntary safety practices with respect to back-up bells on its garbage trucks. *Ibid.*

AUTOMOBILES — Continued**§ 94.8. Contributory Negligence of Passenger; Failure to Remonstrate with Driver**

The evidence was insufficient to permit a jury finding that decedent was contributorily negligent in continuing to ride with defendant or in failing to remonstrate with defendant. *Watson v. Storie*, 327.

BANKS AND BANKING**§ 3. Duties to Depositors in General**

The courts of N. C. possess the power to order the production of bank records as part of an investigation of criminal activities of the bank's customers, and it is within the courts' authority to order that examination of the records remain confidential. *In re Superior Court Order*, 63.

BASTARDS**§ 8. Verdict Generally**

A verdict of "guilty of nonsupport of illegitimate child" was improper because it did not allude generally to the warrant or use specific language sufficient to show a conviction of the offense charged. *S. v. Hobson*, 619.

BROKERS AND FACTORS**§ 1.1. Real Estate Brokers**

A contract granting plaintiff the right to sell property was not patently ambiguous where the subject property was clearly capable of identification by reference to extrinsic matters. *Lambe-Young, Inc. v. Cook*, 588.

§ 6. Right to Commissions Generally

The trial court did not err by instructing the jury that it should determine general damages by multiplying the percent of commission the parties had agreed upon by the price for which defendants sold the warehouse. *Lambe-Young, Inc. v. Cook*, 588.

BURGLARY AND UNLAWFUL BREAKINGS**§ 1. Definition**

The crimes of felonious breaking or entering and felonious larceny are clearly separate and distinct crimes, neither one a lesser included offense of the other, so that defendant could properly be convicted of both. *S. v. Edmondson*, 426.

§ 1.2. What Constitutes "Breaking"

The State's evidence of constructive breaking by trickery was sufficient to support conviction of defendants for felonious breaking or entering. *S. v. Wheeler*, 191.

§ 3. Indictment

An indictment was insufficient to charge felonious breaking or entering where it failed to specify the felony which defendant intended to commit. *S. v. Vick*, 338.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 9.1. Competency of Evidence

Testimony concerning plaintiff's intestate's health, appearance and inability to talk coherently was relevant to an action to recover assets due to constructive fraud, mental incapacity, and undue influence. *Stilwell v. Walden*, 543.

CONSTITUTIONAL LAW

§ 21. Right to Security in Person and Property

Even if the trial court's order to produce documents did affect the constitutional privacy interests of respondent corporation's customers, respondent had no standing to contest that any such interests had been violated. *In re Superior Court Order*, 63.

§ 24.7. Service of Process and Jurisdiction over Foreign Corporations

The exercise of jurisdiction by North Carolina over defendant, a foreign corporation, violated due process because the minimum contacts needed to justify in personam jurisdiction were not established. *Sola Basic Industries v. Electric Membership Corp.*, 737.

§ 30. Discovery

A defendant is not entitled to the pretrial discovery of copies of statements of the State's witnesses. *S. v. Beam*, 181.

The trial court properly denied defendant's pretrial motion for the discovery of evidence allegedly possessed by the State where sworn statements showed that such evidence was not exculpatory. *Ibid.*

§ 50. Speedy Trial Generally

Defendant's constitutional right to a speedy trial was not violated by a year's delay between the original indictments and his trial. *S. v. Smith*, 293.

§ 67. Identity of Informants

The trial court did not err in denying defendant's motion for disclosure of the identity of a confidential informant. *S. v. Walker*, 403.

The court did not err in denying defendant's motion to disclose a confidential informant's identity where defendant did not show that the disclosure was essential to a fair determination of his rights, the search was made on the basis of a search warrant showing probable cause, and the informant did not participate in and was not a material witness to the crime. *S. v. Craver*, 555.

§ 76. Nontestimonial Disclosures by Defendant

Where the evidence failed to show that defendant was given the *Miranda* warnings upon arrest, his due process rights were not violated by the State's attempt to impeach him with evidence of his post-arrest silence, nor was defendant's right to remain silent violated. *S. v. McGinnis*, 421.

CONTEMPT OF COURT

§ 3. Civil or Indirect Contempt

The district court had a choice as to whether it would treat plaintiff's alleged disobedience of a child custody order as civil or criminal contempt, and the proceeding was for criminal contempt where the court ordered the arrest of plaintiff. *Mather v. Mather*, 106.

CONTEMPT OF COURT – Continued**§ 5. Orders to Show Cause**

The trial court erred in ordering the arrest of plaintiff to be held for \$10,000 bail to secure her appearance at a show cause hearing. *Mather v. Mather*, 106.

§ 5.1. Sufficiency of Notice and Show Cause Order

Defendant's motion established sufficient grounds for issuing an order requiring plaintiff to show cause why she should not be held in contempt for disobedience of a child visitation order where defendant alleged that plaintiff surreptitiously removed the children from this state and concealed their location. *Mather v. Mather*, 106.

§ 6.2. Hearings on Orders to Show Cause; Sufficiency of Evidence

The trial court did not err in concluding that plaintiff was in willful contempt of prior court orders where the evidence showed that plaintiff repeatedly interfered with defendant's telephone visitation of their child and plaintiff failed to appear for scheduled hearings; however, the trial court erred in holding plaintiff in contempt on the ground that she willfully attempted to avoid, ignore and circumvent lawful orders of the court by filing an action in Virginia. *O'Briant v. O'Briant*, 360.

The evidence was insufficient to support the court's findings in an order holding defendant mother in contempt for failure to comply with the terms of a child visitation order by failing to inform plaintiff father of her new address and by refusing to permit the child to visit with plaintiff when a request was made by his mother as his agent. *Bethea v. McDonald*, 566.

§ 7. Punishment for Contempt

An order finding defendant in contempt for failure to comply with terms of child visitation in a custody order was erroneous in failing to specify how defendant might purge herself of contempt, and the court wrongfully applied a criminal contempt punishment in a civil proceeding in ordering defendant jailed for 30 days without stating what action she could take to secure her release. *Bethea v. McDonald*, 566.

CONTRACTS**§ 4.1. Circumstances where Consideration Was Found**

In an action to recover the balance due under a written construction contract, the trial court erred in entering summary judgment for defendant where a genuine issue of fact existed as to whether the parties intended a release to relate to work already performed and therefore monies indisputably due, or to relate to the termination of the parties' contract and settlement of plaintiff's entitlement to the full contract price. *Maintenance Service v. Construction Co.*, 49.

§ 6. Contracts Against Public Policy Generally

A contract for the payment of a fee to an attorney contingent upon the securing of a separation or divorce or upon the amount of alimony obtained is void as against public policy. *Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson*, 147.

§ 17.2. Termination

Defendant owed license fees until the end of a 90-day period which was the shortest notice a party could give of voluntary termination of the agreement. *Marcoin, Inc. v. McDaniel*, 498.

CONTRACTS — Continued**§ 18. Modification, Abandonment and Waiver**

The burden of proving modification or waiver is on the party asserting it. *Lambe-Young, Inc. v. Cook*, 588.

§ 21.2. Sufficiency of Performance; Breach of Building and Construction Contracts

Substantial performance of a construction contract does not preclude an action for defects not readily apparent upon completion. *Waynick Construction v. York*, 287.

§ 23. Waiver of Breach

Defendant waived plaintiff's breach of a licensing agreement in failing to furnish defendant with a blanket fidelity bond. *Marcoin, Inc. v. McDaniel*, 498.

§ 25.1. Actions on Contracts; Sufficiency of Particular Allegations in Pleadings

Plaintiffs complaint stated a claim for relief against defendant attorneys for breach of an agreement to reimburse plaintiff for payments made on behalf of a third party from proceeds of a personal injury claim they were handling for the third party. *Forbes Homes, Inc. v. Trimpi*, 614.

§ 26.1. Competency of Evidence of Negotiations; Parol Evidence Rule

The fee provisions of licensing agreements were not ambiguous, and the trial court properly invoked the parol evidence rule to exclude a fact sheet furnished to the licensee which discussed the licensing fees. *Marcoin, Inc. v. McDaniel*, 498.

CONTRIBUTION**§ 1. Generally**

Where a judgment was obtained against both plaintiff and defendant, plaintiff paid the judgment in full, and plaintiff then sought contribution from defendant for one-half the total amount paid to satisfy the judgment, there was no merit to defendant's contention that, because plaintiff failed to enter a notation on the judgment docket as required by G.S. 1B-7, he failed to preserve the right to seek contribution from joint obligors. *Holcomb v. Holcomb*, 471.

CORPORATIONS**§ 8. Authority and Duties of President**

Respondent corporate officer could be held personally liable for unpaid sales and use taxes, and there was no merit to his contention that, in order to be liable for the taxes, he had to have possession of corporate funds at the time when the corporation owed state taxes and allowed the funds to be paid out or distributed to the stockholders. *In re Petition of Jonas*, 116.

§ 16.1. Federal and State Regulation of Sale of Securities

The doctrine of *in pari delicto* barred plaintiff's claims against defendant stockholders for losses incurred from stock in insurance companies purchased upon alleged false representations by defendants that they had "inside information" concerning imminent takeovers of the two companies. *Skinner v. E. F. Hutton & Co.*, 517.

CORPORATIONS — Continued**§ 22. Corporate Seal**

There was no merit to plaintiff's contention that the jury could have found that the contract between the parties was under seal because defendant's corporate seal was placed on the contract. *Square D Co. v. C. J. Kern Contractors*, 30.

§ 25. Contracts and Notes

A release between a parent corporation and plaintiff was intended to benefit defendant, a wholly-owned subsidiary. *Maintenance Service v. Construction Co.*, 49.

COURTS

§ 9.3. Jurisdiction to Revise Rulings of Another Superior Court Judge; Motions to Amend Pleadings

Where the order of one superior court judge allowed an amendment to the complaint, a second judge exceeded his authority in ruling that the amendment did not relate back to the original complaint so that the claim was barred by the statute of limitations. *Estrada v. Jaques*, 627.

CRIMINAL LAW

§ 5.2. Mental Capacity as Affected by Unconsciousness

The trial court erred in excluding expert testimony that the highly intoxicated defendant may have sustained a concussion which would have rendered him unconscious even without the presence of alcohol and in refusing to instruct on the defense of unconsciousness. *S. v. Snyder*, 335.

§ 21.1. Preliminary Hearing

Defendant had no statutory or constitutional right to a preliminary hearing. *S. v. Beam*, 181.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Common Plan

In a prosecution for the murder of a rest home patient who died after defendant assaulted him, testimony concerning assaults by defendant on other rest home patients was competent to show a common scheme and to show defendant's motive for assaulting deceased. *S. v. Beam*, 181.

§ 35. Evidence that Offense Was Committed by Another

The trial court erred in refusing to allow defendant to testify that a third person from whom he claimed to have received goods stolen during a robbery matched the victims' physical description of the robber. *S. v. Woodruff*, 561.

§ 46.1. Competency of Evidence of Flight

The trial court did not err in instructing the jury that defendant's flight could be considered in determining his credibility. *S. v. McGinnis*, 421.

§ 48. Silence of Defendant as Implied Admission

Where the evidence failed to show that defendant was given the *Miranda* warnings upon arrest, his due process rights were not violated by the State's attempt to impeach him with evidence of his post-arrest silence, nor was defendant's right to remain silent violated. *S. v. McGinnis*, 421.

CRIMINAL LAW — Continued**§ 52. Examination of Experts**

There was no error in allowing a physician who treated an assault victim to testify that there were metallic artifacts on the victim's head "like something frequently seen in gunshot wounds." *S. v. Spears*, 747.

§ 61.2. Evidence as to Shoe Prints

The trial court did not err in admitting opinion testimony by investigating officers as to whether defendant's tennis shoes made the tracks present at the crime scene. *S. v. Edmondson*, 426.

§ 66.9. Suggestiveness of Photographic Identification Procedure

Photographic procedures in which two witnesses identified defendants as the perpetrators of an armed robbery were not impermissibly suggestive. *S. v. Ford*, 244.

§ 66.11. Identification of Defendant; Confrontation at Crime Scene

The use of an unnecessarily suggestive pretrial showup when police brought defendant to a burglary and assault victim's home did not create a substantial likelihood of misidentification so as to require the exclusion of the victim's in-court identification of defendant. *S. v. McNair*, 331.

§ 66.15. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Lineups

An in-court identification of defendant by an assault victim was of independent origin and not tainted by pretrial photographic or lineup identifications. *S. v. Grier*, 40.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

The trial court did not err in concluding that a robbery victim's in-court identification of defendant was of independent origin and not tainted by a pretrial photographic identification. *S. v. Lassiter*, 731.

§ 73.2. Statements Not within Hearsay Rule

Testimony by deceased's mother that a doctor had told her that her son had an enlarged heart was not inadmissible hearsay. *S. v. Beam*, 181.

§ 75.2. Admissibility of Confession; Effect of Promises by Officers

Defendant's confession to North Carolina authorities should not have been admitted when the confession was improperly induced by Tennessee authorities. *S. v. Richardson*, 509.

§ 77.1. Admissions and Declarations of Defendant

The trial court erred in the exclusion of testimony by defendant that he did not commit the robbery in question. *S. v. Lassiter*, 731.

§ 80.1. Foundation for Admission of Records

A sufficient foundation was laid for the admission of an employee time card. *S. v. Vick*, 338.

§ 85.2. Admissibility of Character Evidence Relating to Defendant; State's Evidence Generally

Defendants were not prejudiced when the trial court permitted the prosecution to cross-examine defendants' character witness as to knowledge of defendants' guilty pleas in prior marijuana cases. *S. v. McLamb*, 712.

CRIMINAL LAW — Continued**§ 86.5. Credibility of Defendant; Particular Questions**

The State had a good faith basis for asking defendant on cross-examination whether he was involved in opening coin-operated machines and selling cookies and candies taken from them. *S. v. McNair*, 331.

§ 86.8. Credibility of Defendant and Interested Parties; State's Witnesses

There was no error in refusing to allow a State's witness to answer a question about the amount of time he would actually serve when the amount of time he would actually serve was speculative. *S. v. Rutherford*, 674.

§ 91. Nature and Time of Trial; Speedy Trial

Where defendant was permitted to withdraw his no contest plea when his case was called for sentencing, the prosecutor did not violate G.S. 7A-49.3 when he added defendant's case to the trial calendar and began the trial the next day. *S. v. Edwards*, 317.

The trial court's findings were insufficient to support its order dismissing indictments against defendant "without prejudice." *S. v. Smith*, 293.

The trial court erred in denying defendant's motion to dismiss pursuant to the Speedy Trial Act where more than 120 days elapsed between defendant's mistrial and his motion for dismissal and the hearing thereon. *S. v. Jones*, 467.

§ 92. Consolidation of Charges Against Multiple Defendants

The State's motion for joinder of defendants' cases made at the beginning of trial was not required to be in writing. *S. v. Ford*, 244.

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

The trial court properly refused to consolidate breaking or entering and larceny charges filed against defendant in Robeson County with breaking or entering and larceny charges filed against him in Scotland County. *S. v. Smith*, 293.

§ 101. Conduct or Misconduct Affecting Jurors

The court did not abuse its discretion by denying defendants' motion for a mistrial where a juror and a witness for the State discussed whether they had mutual acquaintances during a lunch recess. *S. v. Rutherford*, 674.

§ 101.2. Conduct Affecting Jurors; Exposure to Evidence Not Formally Introduced

The trial court did not err in failing to declare a mistrial when defendant's probation officer told one of the jurors with whom she was personally acquainted that she was defendant's probation officer. *S. v. Kornegay*, 579.

§ 102.6. Particular Conduct and Comments in Jury Argument

Although a prosecutor characterized the crime as terrible and may have improperly traveled outside the record and injected his own personal beliefs, he made no comment as to the character of the defendant and there was no prejudicial error. *S. v. Spears*, 747.

§ 114.3. No Expression of Opinion in Instructions

The trial judge did not express an opinion when he used an example similar to the facts of the case in explaining the difference between actual and constructive possession of marijuana. *S. v. McLamb*, 712.

CRIMINAL LAW — Continued**§ 123. Form and Sufficiency of Issues**

Defendant was not prejudiced by the order of the charges on the verdict form where the form began with the most serious charge and listed alternative verdicts in descending order of severity. *S. v. Bates*, 477.

§ 124. Sufficiency and Effect of Verdict

A verdict was improper because it did not allude generally to the warrant or use specific language sufficient to show a conviction of the offense charged. *S. v. Hobson*, 619.

§ 134.4. Sentencing of Youthful Offender

Where defendant was twenty years old at the time of his conviction, the trial court erred in failing to sentence defendant as a committed youthful offender or to make a no benefit finding. *S. v. McRae*, 779.

§ 138. Severity of Sentence and Determination Thereof

The trial court was not required to consider defendant's drug use as a mitigating factor in imposing a sentence for robbery. *S. v. Grier*, 40.

The trial court erred in finding as aggravating factors that the sentence pronounced was necessary to deter others from committing the same offenses and that a lesser sentence would unduly depreciate the seriousness of defendant's crimes. *S. v. Wheeler*, 191.

The trial court improperly found as aggravating factors in armed robbery judgments that the victims were very old and that the female victim was physically infirm. *Ibid.*

The trial court erred in relying on the same evidence to support findings that defendant had served prior prison terms, had a long history of prior criminal activity, and had prior convictions punishable by more than 60 days confinement. *Ibid.*

In a prosecution for assault with a deadly weapon inflicting serious injury, there was no error in the trial court's failure to consider as a mitigating factor that defendant took the victim to an emergency clinic. *S. v. Spears*, 747.

The trial court failed to afford defendant a proper sentencing hearing where the court told defense counsel a month before the hearing that he intended to give defendant the same sentence of 40 years which he had given to a codefendant, and the court repeated this intention when defendant and his attorney appeared in court for the sentencing. *S. v. McRae*, 779.

In a prosecution for incest where the evidence showed that defendant pled guilty to one count of incest with his fifteen-year-old daughter, but that defendant's incestuous relationship with his daughter began when she was twelve years old, the evidence supported the trial court's finding in aggravation that the victim was very young. *S. v. Jackson*, 782.

§ 138.6. Severity of Sentence; Matters and Evidence Considered

Defendant's escape from the courtroom after the verdict was relevant evidence for the court to consider in sentencing defendant. *S. v. Kornegay*, 579.

There was no merit to defendant's contention that his caution to avoid causing bodily harm by deciding to commit larceny rather than robbery should have been found as a mitigating factor in sentencing defendant for breaking or entering and larceny. *Ibid.*

CRIMINAL LAW — Continued**§ 138.7. Severity of Sentence; Particular Matters and Evidence**

In a rape and kidnapping case the trial court properly found as aggravating factors that defendant raped the victim in this case nine years earlier and that he committed these offenses while on parole. *S. v. Covel*, 490.

Where defendant was convicted of second-degree murder, the trial court did not err at the sentencing hearing by finding as an aggravating factor that the killing occurred after defendant premeditated and deliberated it; nor did the court err in failing to find as mitigating factors that defendant was suffering from a mental condition which significantly reduced his culpability for the offense, that he acted under strong provocation, or that the relationship between him and the victim was otherwise extenuating. *S. v. Monroe*, 462.

§ 145.6. Forfeitures

The statute relating to forfeiture of gain acquired through felonies did not apply to money paid by defendant to an undercover agent on a contract to kill defendant's wife, but the trial judge properly disposed of the money. *S. v. Triplett*, 341.

§ 148. Judgments Appealable

The trial court's order setting aside the verdict, vacating the judgment and ordering a new trial on the ground that the verdict was contrary to the weight of the evidence was interlocutory and not appealable. *S. v. Howard*, 487.

§ 181. Postconviction Hearing

Where defendant received a fair trial free of prejudicial error, the denial of his motion for appropriate relief was harmless error. *S. v. Craver*, 555.

CUSTOMS AND USAGES**§ 1. Generally**

The trial court erred in excluding evidence of industry custom and defendant town's own voluntary safety practices with respect to back-up bells on its garbage trucks. *Briggs v. Morgan*, 57.

DAMAGES**§ 5. Damages for Injury to Real Property**

The measure of damages for defendant's closing of an alley in violation of plaintiff's easement rights was the difference in fair market value of plaintiff's land immediately before and after the taking. *Knott v. Washington Housing Authority*, 95.

§ 11.2. Circumstances where Punitive Damages Inappropriate

The evidence showed only a fraudulent conveyance rather than a legal fraud, and plaintiff was thus not entitled to recover punitive damages for defendant's breach of a licensing agreement. *Marcoin, Inc. v. McDaniel*, 498.

§ 17.7. Proof of Punitive Damages

Evidence that defendant landlord knew an apartment building did not have attic fire walls and failed to correct this condition did not show willful and wanton negligence which could support an award of punitive damages. *Starkey v. Cimarron Apartments; Evans v. Cimarron Apartments*, 772.

DEATH

§ 4. Time within which Wrongful Death Actions Must Be Instituted

Plaintiff's malpractice claim against defendant physician was barred by the 4-year statute of repose of G.S. 1-15(c). *Walker v. Santos*, 623.

DECLARATORY JUDGMENT ACT

§ 4.3. Availability of Remedy in Insurance Matters

The exhaustion requirement of G.S. 58-155.52(a) does not impose a precondition to a declaratory judgment action to have various rights and liabilities of the involved insurers clarified. *City of Greensboro v. Reserve Insurance Co.*, 651.

§ 4.4. Availability of Remedy in Real Property Matters

There was a sufficient controversy between the estate of a life tenant and the remaindermen to permit a declaratory judgment concerning a lease executed by the life tenant six days before her death and who was entitled to the rent paid for the lease. *Coleman v. Edwards*, 206.

DIVORCE AND ALIMONY

§ 1.1. Jurisdiction; Residency Requirement

The requirement of N. C. law that one of the parties to a divorce action based on one year's separation be a resident of this State for six months next preceding the filing of the divorce action is jurisdictional and confers the necessary subject matter jurisdiction for the trial court to proceed *in rem* under G.S. 1-75.8(3). *Chamberlin v. Chamberlin*, 474.

§ 16.5. Alimony without Divorce; Competency and Relevancy of Evidence

Cross-examination of defendant husband as to whether a certain female had been staying with him was properly permitted as bearing on the question of the reasonableness of defendant's living expenses. *Spencer v. Spencer*, 159.

§ 16.6. Alimony without Divorce; Sufficiency of Evidence

In order to establish adultery the evidence, whether circumstantial or direct, must tend to show both opportunity and inclination to engage in sexual intercourse. *Wallace v. Wallace*, 458.

§ 16.8. Alimony without Divorce; Finding; Ability to Pay

A jury finding that defendant husband had not willfully failed to support plaintiff wife was not *res judicata* on the issue of defendant's depression of his income after the complaint was filed. *Spencer v. Spencer*, 159.

The trial court's findings were insufficient to support its award of alimony and child support to the wife. *Ibid.*

§ 17.3. Amount of Alimony upon Divorce from Bed and Board

Plaintiff was entitled to summary judgment in her action to prevent defendant from interfering with her right of possession of the marital home. *Minor v. Minor*, 76.

§ 19.5. Modification of Decree; Effect of Separation Agreements

The parties' separation agreement which was incorporated into the court's divorce judgment could be modified with respect to its alimony provisions, notwithstanding language in the agreement that it could not be modified without the consent of the parties. *Acosta v. Clark*, 111.

DIVORCE AND ALIMONY — Continued**§ 21. Enforcement of Alimony Awards Generally**

The trial court did not err in refusing to instruct upon and to submit to the jury the issue of plaintiff's waiver of alimony. *Boyles v. Boyles*, 415.

§ 21.6. Enforcement of Alimony Awards; Effect of Separation Agreements

A wife's acceptance of late payments in some months does not waive her right under the terms of the separation agreement to bring an action for alimony based on nonpayment in other months. *Cator v. Cator*, 719.

A husband's failure to make alimony payments did not constitute a substantial failure to perform amounting to a material breach of the separation agreement. *Ibid.*

§ 21.9. Equitable Distribution of Marital Property Generally

The trial court did not err in concluding that part of a lot was defendant's separate property not subject to equitable distribution. *Crumbley v. Crumbley*, 143.

Marital misconduct or fault is not a proper factor to be considered in determining an equitable distribution of marital property, and the court erred in concluding that the wife was entitled to a greater share of the property than the husband based in part upon a determination that injuries from beatings received by the wife have affected her employability. *Hinton v. Hinton*, 665.

§ 24.1. Determining Amount of Child Support

There was no error in the court's failure to consider the children's substantial trust accounts. *Sloop v. Friberg*, 690.

§ 24.4. Enforcement of Child Support Orders

The trial court erred in ordering defendant's imprisonment for continuing civil contempt until he paid a certain amount in child support arrearages where the court's order was supported only by a finding that defendant had a present ability to pay a portion of the sum ordered. *Brower v. Brower*, 131.

§ 24.9. Child Support; Findings

The findings were not sufficient to support an award of child support. *Sloop v. Friberg*, 690.

The fact that there were inconsistencies between the actual dollar amounts testified to and those in a child support order does not in and of itself constitute error. *Ibid.*

§ 24.10. Termination of Child Support Obligation

Defendant was not relieved of his obligation to pay child support until his children reached 21 because the age of majority changed from 21 to 18 years under the laws of the state where the children were domiciled. *Boyles v. Boyles*, 415.

§ 25. Child Custody Generally

Defendant's motion established sufficient grounds for issuing an order requiring plaintiff to show cause why she should not be held in contempt for disobedience of a child visitation order where defendant alleged that plaintiff surreptitiously removed the children from this state and concealed their location. *Mather v. Mather*, 106.

§ 25.3. Child Custody; Consideration of Child's Preference

Respondent could not complain of the result where the parties had stipulated that the court could enter final judgment on custody and visitation issues in accordance with the wishes of the three children. *Sloop v. Friberg*, 690.

DIVORCE AND ALIMONY — Continued

§ 25.9. Modification of Child Custody Order where Evidence of Changed Circumstances Is Sufficient

Evidence was sufficient to support the trial court's finding that there had been a change in circumstances sufficiently substantial to warrant modification of a child custody order. *O'Briant v. O'Briant*, 360.

The trial court's wording that plaintiff suffered from "very serious psychiatric problems" in concluding that she was not then emotionally fit for custody of her child, though improper, was not prejudicial to plaintiff. *Ibid*.

§ 25.12. Child Custody; Visitation Privileges

The trial court could properly use a reduction of child support to enforce child visitation rights. *Mather v. Mather*, 106.

The evidence was insufficient to support the court's findings in an order holding defendant mother in contempt for failure to comply with the terms of a child visitation order by failing to inform plaintiff father of her new address and by refusing to permit the child to visit with plaintiff when a request was made by his mother as his agent. *Bethea v. McDonald*, 566.

§ 27. Attorney's Fees Generally

The trial court did not err in its award of counsel fees to the wife in an action for alimony and child support because she had two attorneys present at the trial. *Spencer v. Spencer*, 159.

The court did not err in awarding an amount for staff time in addition to attorneys' fees. *Sloop v. Friberg*, 690.

EASEMENTS

§ 5.3. Creation of Easement by Implication; Sufficiency of Evidence

Plaintiff had an easement implied from prior use in an alley which bordered her property. *Knott v. Washington Housing Authority*, 95.

EJECTMENT

§ 3. Termination of Term; Nonpayment of Rent

There was no merit to defendant's contention that she should not be evicted for nonpayment of rent because her husband was liable under the doctrine of necessities for rent payments on an apartment leased from plaintiff. *Maxton Housing Authority v. McLean*, 550.

A lease provision that immediate eviction would result if utilities were discontinued because of nonpayment was valid. *Ibid*.

ELECTRICITY

§ 2.1. Servicing Territory Annexed by Municipality

The rights of a municipality competing to provide electric service within the corporate limits of another municipality are determined by G.S. 160A-331 through 338, under which a municipal corporation may be a "person" and a "secondary supplier." *Morgan v. Town of Hertford*, 725.

ESTATES**§ 4.1. Termination of Life Estate; Allocation of Rents and Income**

Where a life tenant executed a lease of land for a year six days before her death, and the rent for the entire year was paid to the life tenant's estate, the estate of the life tenant was entitled only to the proportion of the rent which had accrued prior to the death of the life tenant. *Coleman v. Edwards*, 206.

ESTOPPEL**§ 1. Creation and Estoppel by Deed**

The doctrine of estoppel by deed did not apply to defeat the statutory lien of a bank's deed of trust because the bank had actual notice of a prior deed of trust which had been recorded before the debtor acquired title. *Schuman v. Roger Baker and Assoc.*, 313.

EVIDENCE**§ 1. Judicial Notice of Legislative and Executive Acts of this State**

The trial court was not required to take judicial notice of administrative regulations promulgated by the Utilities Commission and the U.S. Department of Transportation. *Southern Railway Co. v. O'Boyle Tank Lines*, 1.

§ 11. Transactions or Communications with Decedent in General

Testimony against the representative of a deceased person is not incompetent where a party "associated in the contract and united in interest" with the deceased is still alive. *Lambe-Young, Inc. v. Cook*, 588.

§ 14. Communications between Physician and Patient

Defendant waived his objection to a psychiatrist's testimony on the ground of the physician-patient privilege. *Spencer v. Spencer*, 159.

§ 15. Relevancy and Competency of Evidence in General

In an action for negligence resulting from a pump assembly falling on plaintiff, there was no prejudice from the exclusion of the pump manufacturer's instruction manual because it contained no information about lifting the motor, the pump or assembly, or about the purpose of the hooking rings. *Millikan v. Guilford Mills, Inc.*, 705.

§ 18. Experimental Evidence

In an action to recover for the death of plaintiff's husband who was killed when the accelerator of his truck allegedly stuck and he ran into a bridge abutment, the trial court did not err in admitting evidence of experimental test drives by expert witnesses for defendant. *Short v. General Motors Corp.*, 454.

§ 23. Competency of Allegations in Pleadings

Plaintiff was entitled to introduce defendant's admissions into evidence, and had a right to have the court tell the jury that facts stated therein were not disputed. *Stilwell v. Walden*, 543.

§ 24. Depositions

The deposition of a party, if otherwise admissible, may be introduced even if that party is present in court. *Stilwell v. Walden*, 543.

EVIDENCE — Continued**§ 25. Photographs**

A witness is not required to qualify as an expert in order to testify that he believes separate photographs depict the same subject and to point out to the jury why he so believes. *Superior Tile v. Rickey Office Equipment*, 258.

§ 27. Tape Recordings

The trial court did not err in admitting videotapes of defendant's experimental evidence. *Short v. General Motors Corp.*, 454.

§ 33.2. Examples of Hearsay Testimony

A third party's sworn answers to interrogatories were inadmissible as hearsay and properly excluded. *Millikan v. Guilford Mills, Inc.*, 705.

Testimony by a witness that another person had told one of the individual defendants that certain pipes were rotten was inadmissible hearsay. *Superior Tile v. Rickey Office Equipment*, 258.

§ 45. Evidence as to Value

Plaintiff's son was qualified to testify as to the value of his mother's property immediately before and after defendant closed an alley in violation of the mother's easement rights. *Knott v. Washington Housing Authority*, 95.

§ 47. Expert Testimony in General

Where the facts upon which an architect intended to rely in answering a question were already in evidence, personal knowledge was not a prerequisite for the architect to give an opinion. *Waynick Construction v. York*, 287.

§ 48. Competency and Qualification of Experts

A formal offer of an architect to the court as an expert was not required for the architect to state his opinions. *Waynick Construction v. York*, 287.

EXECUTORS AND ADMINISTRATORS**§ 36.1. Motions to Set Aside Order Approving Final Account and Discharging Personal Representative**

The clerk of superior court correctly treated a voluntarily dismissed suit as a "claim" against an estate and acted within his authority in setting aside an order discharging petitioner as administrator. *In re Watson*, 120.

§ 39. Actions against Personal Representative in General

Where plaintiffs sought an accounting by defendant as executor of two estates in which he had qualified and they also sought to have defendant removed as executor, the trial court erred in denying defendant's motion for change of venue to the county in which he had qualified. *DesMarais v. Dimmette*, 134.

FALSE PRETENSE**§ 1. Nature and Elements of the Crime**

Defendant was properly indicted and convicted for obtaining property by false pretenses where he made a false representation regarding his employment status and thereby made an additional representation beyond the presentation of a worthless check. *S. v. Hopkins*, 530.

FALSE PRETENSE — Continued**§ 3. Evidence**

In a prosecution for obtaining property by false pretense, testimony that the business on which the check had been drawn had closed its account and that all checks presented against the account had been and would be dishonored was clearly relevant. *S. v. Hopkins*, 530.

§ 3.1. Nonsuit

There was sufficient evidence for a conviction under G.S. 14-100. *S. v. Hopkins*, 530.

FRAUD**§ 3.2. Material Misrepresentation of Past or Subsisting Fact; Statement of Opinion**

Defendants' evidence was insufficient to establish fraud where alleged defects in the property suggested only that the property was worth less than expected. *Hyde v. Taylor*, 523.

§ 5.1. Reliance on Misrepresentation; Inspection

Defendants' evidence was insufficient to establish fraud where defendants had thoroughly inspected the property before executing a contract and note. *Hyde v. Taylor*, 523.

§ 7. Constructive or Legal Fraud

In an action alleging constructive fraud, there was evidence from which a jury could find that a confidential or fiduciary relationship existed. *Stilwell v. Walden*, 543.

§ 11. Competency and Relevancy of Evidence

Testimony that defendant had her interest in mind in administering plaintiff's intestate's trust funds and that defendant's interest was a factor in the trust being established was relevant and material to an action to recover assets conveyed due to constructive fraud, mental incapacity, and undue influence. *Stilwell v. Walden*, 543.

§ 12.1. Nonsuit

The evidence failed to show fraud in the inducement of licensing agreements. *Marcoin, Inc. v. McDaniel*, 498.

FRAUDULENT CONVEYANCES**§ 3.4. Sufficiency of Evidence**

In an action by creditors to set aside conveyances as fraudulent, the evidence presented genuine issues of material fact as to whether the conveyances were supported by adequate consideration. *Smith-Douglass v. Kornegay; First-Citizens Bank v. Kornegay*, 264.

HIGHWAYS AND CARTWAYS**§ 2.1. Restrictions against Advertisements Along Highways**

Revocation of an outdoor advertising sign permit was improper where the evidence showed only that the permittee's truck was parked on the shoulder of an interstate highway in violation of G.S. 136-89.58(5) while its employees were servicing its sign. *Ace-Hi, Inc. v. Dept. of Transportation*, 214.

HOMICIDE

§ 2. Principals and Accessories

Solicitation to commit murder is a felony for which the superior court has jurisdiction. *S. v. Triplett*, 341.

§ 7.1. Defense of Unconsciousness

The trial court erred in excluding expert testimony that the highly intoxicated defendant may have sustained a concussion which would have rendered him unconscious even without the presence of alcohol and in refusing to instruct on the defense of unconsciousness. *S. v. Snyder*, 335.

INDICTMENT AND WARRANT

§ 4. Validity of Proceedings before Grand Jury as Affected by Competency of Evidence

An indictment will not be quashed on the ground that testimony before the grand jury may have been hearsay. *S. v. Beam*, 181.

INFANTS

§ 2. Liability of Infants on Contracts Generally

A minor's misrepresentation of his age did not bar him from disaffirming his contract for the purchase of a car. *Gillis v. Whitley's Discount Auto Sales*, 270.

§ 2.1. Liability of Infants on Contracts for Necessities

Since the affirmative defense that a car purchased by a minor was a necessity was not pleaded or effectively argued before the trial court at a hearing on a motion for summary judgment, it could not be raised for the first time on appeal. *Gillis v. Whitley's Discount Auto Sales*, 270.

A minor was entitled to recover the down payment on the purchase of a car after his disaffirmance of the purchase, but the evidence on motion for summary judgment failed to show that the minor was entitled to recover the total proceeds of a bank loan used to purchase the car. *Ibid*.

§ 5. Jurisdiction to Award Custody of Minor

The district court did not lack jurisdiction where respondent had acquiesced for several years in an earlier judgment from district court, and where district courts possess general subject matter jurisdiction over child custody disputes. *Sloop v. Friberg*, 690.

§ 6.7. Child Custody; Award of Visitation Rights

G.S. 50-13.5(i) requires specific findings of fact to justify restrictions on visitation allowing the custodian to determine times, places, and conditions of visitation. *Sloop v. Friberg*, 690.

INSURANCE

§ 1. Control and Regulation Generally

The North Carolina Insurance Guaranty Association is a statutory creation that does not have liability for prejudgment interest. *City of Greensboro v. Reserve Insurance Co.*, 651.

INSURANCE — Continued

§ 41. Health Insurance; Inception of Sickness

Plaintiff did not contract her "sickness" until after a policy issued by defendant became effective since her leg pains did not preclude or significantly interfere with her usual functions and activities until after the effective date of the policy. *McDaniel v. N. C. Mutual Life Ins. Co.*, 480.

§ 79.1. Automobile Liability Insurance Rates

G.S. Chapter 58 does not provide the exclusive remedy for those damaged by unfair trade practices in the insurance industry, and allegations of unfair fixing of insurance rates should be permitted to be raised under G.S. 75-5 as well. *Phillips v. Integon Corp.*, 440.

§ 88. Garage Liability Insurance

An accident which occurred while a truck was being driven on the highway by a service station-garage owner after he had serviced it for the purpose of assisting the customer to start the truck was covered by the owner's garage liability policy. *Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 742.

§ 92. Automobile Liability Insurance; "Other Insurance" Clause

G.S. 58-155.52(a) does not apply to concurrent coverage where the operation of an "other insurance" clause has suspended coverage on the policy of the insolvent insurer. *City of Greensboro v. Reserve Insurance Co.*, 651.

§ 93. Automobile Liability Insurance; "Excess Insurance" Clause

Where insured was covered by policies executed by plaintiff and defendant and neither policy was primary or excess, the excess insurance clauses in the policies were mutually repugnant, and coverage for the insured accident was properly prorated. *Alliance Mutual Ins. Co. v. N. Y. Central Ins. Co.*, 140.

§ 123. Fire Insurance; Conditions; Payment of Premiums

In an action to recover premiums allegedly due for the third year of insurance coverage provided to defendants, defendants had a right to rely on the assumption that their renewal policy with plaintiff would be based upon the same terms and conditions as the policies of the first two years. *Fireman's Fund Ins. Co. v. Williams Oil Co.*, 484.

§ 136. Actions on Fire Policies

Summary judgment was not proper where there were genuine issues of material fact concerning whether plaintiff complied with the provisions of the policy, and where it was not clear that the parties intended for the production of plaintiff's tax returns to be a condition precedent to plaintiff's right to collect under the policy. *Lee v. State Farm Fire and Casualty Co.*, 575.

§ 149. Liability Insurance

Notice of claims against city officials delivered to a general agent with the implied actual authority to accept notice is sufficient to impute notice of the city's liability to the insurance company. *City of Greensboro v. Reserve Insurance Co.*, 651.

An insurance policy was a policy of liability rather than of indemnity. *Ibid.*

Where two public officials liability policies are taken out with other insurance clauses, the issuance of the second policy violates the other insurance clause of the first. *Ibid.*

INSURANCE — Continued

Where two public officials liability policies provided concurrent coverage, the non-duplication of coverage statute did not prohibit a claim against an insolvent insurer under the first policy. *Ibid.*

JUDGMENTS

§ 25.3. Attack on Judgment; Imputation to Litigant of Attorney's Failure to Attend Trial

The trial court erred in denying plaintiff's motion for relief from an order of dismissal where the record showed that plaintiff's counsel did not report to the court or attend the call of the clean-up calendar and negligence of counsel in failing to appear was not imputable to plaintiff. *Simmons v. Tuttle*, 101.

§ 55. Right to Interest

The trial court did not err in concluding that it could not properly enter a judgment allowing pre-judgment interest where plaintiff could not actually pinpoint the date on which her property was damaged. *Knott v. Washington Housing Authority*, 95.

JUDICIAL SALES

§ 3. Advance Bids and Resales

The clerk of superior court erred in requiring the highest bidder at a resale of property to deposit a cash bond in the amount of the bid. *Bomer v. Campbell*, 137.

JURY

§ 1. Nature and Extent of Right to Jury Trial

Defendant was not entitled to a jury trial where the only issue properly before the court was an issue of law. *Town of Kenansville v. Summerlin*, 601.

KIDNAPPING

§ 1.3. Instructions

Where the indictment charged defendant with kidnapping by removing the victim to facilitate flight following the commission of a felony, the court erred in permitting the jury to convict upon finding that defendant removed the victim for the purpose of holding her as a hostage, but defendant waived his objection by failing to object to the instructions prior to beginning of deliberations. *S. v. Woodruff*, 561.

LANDLORD AND TENANT

§ 11. Assignment

Where a lease was executed under seal, the lessor's grantees were entitled to the 10-year statute of limitations for sealed instruments without a formal assignment of the lease itself. *Murphrey v. Winslow*, 10.

§ 19. Rent and Actions Therefor

Defendants were entitled to summary judgment for an unpaid rental payment due under a lease where plaintiff filed a conclusory affidavit stating merely that the payment had been "made." *Murphrey v. Winslow*, 10.

LARCENY

§ 1. Definition

The crimes of felonious breaking or entering and felonious larceny are clearly separate and distinct crimes, neither one a lesser included offense of the other, so that defendant could properly be convicted of both. *S. v. Edmondson*, 426.

§ 7.5. Sufficiency of Evidence; Aiding and Abetting

The evidence was sufficient for the jury on the issue of defendant's guilt of larceny as an aider and abettor. *S. v. Dow*, 82.

§ 9. Verdict

Defendant could not properly be convicted of both felony larceny and possession of stolen goods. *S. v. Dow*, 82.

LIMITATION OF ACTIONS

§ 4.2. Accrual of Cause of Action Based on Negligence

In an action to recover damages arising from a fire in a building housing plaintiffs' condominiums, the statute of repose barred their claims against defendant builders even before the injury occurred. *Colony Hill Condominium I Assoc. v. Colony Co.*, 390.

The six-year statute of repose set forth in G.S. 1-50(5) applied to actions against the developer of a condominium project for negligence in failing to install fire walls in the attics of the condominium buildings. *Starkey v. Cimarron Apartments*; *Evans v. Cimarron Apartments*, 772.

An action brought more than six years after defendant's sale of a lift truck is not cognizable because G.S. 1-50(6) is a statute of repose. *Davis v. Mobilift Equipment Co.*, 621.

MASTER AND SERVANT

§ 8.1. Compensation of Employee

Where plaintiff employee was required to pay additional income taxes because his per diem payments for business expenses exceeded his actual expenses, defendant employer did not breach any legal duty to plaintiff even if the employer failed to establish adequate accounting procedures to make sure that the amounts paid out did not exceed plaintiff's necessary expenses. *Tyson v. Carolina Telephone*, 593.

§ 10.2. Actions for Wrongful Discharge

Plaintiff's evidence was sufficient for the jury in an action brought pursuant to G.S. 97-6.1 to recover damages for retaliatory discharge for filing a workers' compensation claim. *Henderson v. Traditional Log Homes*, 303.

§ 11.1. Covenants not to Compete

The trial court properly granted a preliminary injunction enjoining defendants from breaching covenants not to compete contained in their employment contracts. *Robins & Weill v. Mason*, 537.

§ 53. Workers' Compensation; Dual Employments

Defendant construction company was a special employer of plaintiff and was therefore liable equally with defendant supplier of temporary workers for compensating plaintiff for an injury arising out of and in the course of his employment. *Henderson v. Manpower*, 408.

MASTER AND SERVANT — Continued**§ 55.3. Workers' Compensation; Particular Injuries as Constituting Accident**

Plaintiff suffered a compensable injury to an ear from fluctuating cabin pressure during a flight for her employer on a commercial airliner. *Smith v. DHL Corp.*, 124.

§ 55.4. Workers' Compensation; Relation of Injury to Employment

An employee who owned an airplane which he maintained for his personal use as well as for use when traveling for his employer was not injured by accident arising out of and in the course of his employment while he was returning from Georgia after having flown the airplane there to have new numbers painted on it. *Pollock v. Reeves Bros., Inc.*, 199.

§ 56. Workers' Compensation; Causal Relation between Employment and Injury

Competent medical evidence supported a determination that plaintiff's disabling blackout spells and dizziness were not the result of a head injury received in a work-related accident. *Mebane v. General Electric Co.*, 752.

§ 57. Workers' Compensation; Negligence of Injured Employee

Plaintiff was entitled to recover workers' compensation for injuries sustained during horseplay with a chicken deboning knife. *Bare v. Wayne Poultry Co.*, 88.

§ 67.1. Workers' Compensation; Other Injuries Compensable

The Industrial Commission's finding that an employee suffered loss of or permanent injury to an important part of the body was supported by the evidence. *Sparks v. Sailors' Snug Harbor*, 596.

§ 85.2. Workers' Compensation; Authority of Industrial Commission to Pro-mulgate Rules and Regulations

There was no prejudice when a Deputy Commissioner submitted questions to plaintiff's doctor rather than ordering a deposition. *Sparks v. Sailors' Snug Harbor*, 596.

§ 93.2. Workers' Compensation; Proceedings before Commission; Admissibility of Evidence

The record did not close when a deputy commissioner reset the case for further medical testimony and a different deputy commissioner subsequently referred the case back to the first deputy commissioner for disposition and removed the case from the active hearing docket. *Sparks v. Sailors' Snug Harbor*, 596.

§ 95.1. Workers' Compensation; Procedure to Perfect Appeal

By hearing plaintiff's appeal, the Full Commission waived plaintiff's compliance with a procedural rule and in effect determined defendant's motion to dismiss the appeal for failure to comply with that rule. *Mebane v. General Electric Co.*, 752.

§ 108. Right to Unemployment Compensation Generally

A claimant who, after being told that she would be discharged at the end of the month, informed her employer that she would not return to work to finish out the month did not leave work voluntarily or without good cause attributable to her employer and was entitled to unemployment compensation. *Bunn v. N. C. State University*, 699.

MASTER AND SERVANT — Continued**§ 111.1. Unemployment Compensation; Conclusiveness and Review of Findings by Commission**

The Employment Security Commission's findings were inadequate to resolve the controversy as to travel arrangements and the responsibilities and actions of both parties in an action to recover unemployment compensation wherein claimant contended he left his job because he could no longer afford to travel with the company. *In re Huggins v. Precision Concrete Forming*, 571.

MORTGAGES AND DEEDS OF TRUST**§ 1.1. Equitable Liens**

In an action for a declaratory judgment to convert a deed previously executed to defendant into an equitable mortgage or deed to secure a debt, defendant was properly entitled to summary judgment. *Eagle's Nest, Inc. v. Malt*, 397.

§ 32.1. Restriction of Deficiency Judgments Respecting Purchase Money Mortgages and Deeds of Trust

The anti-deficiency judgment statute does not apply to a holder of a second purchase money deed of trust or mortgage whose security has been destroyed as a result of foreclosure by holder of a first purchase money mortgage or deed of trust. *Blanton v. Sisk*, 70.

The anti-deficiency judgment statute did not prohibit an action on a promissory note by the holder of a purchase money deed of trust who had released his security in accordance with terms of an agreement contained in the purchase money deed of trust. *Barnaby v. Boardman*, 299.

The anti-deficiency statutes did not bar an action on a note when there was no deficiency and when plaintiffs sued on an entirely different obligation. *Hyde v. Taylor*, 523.

MUNICIPAL CORPORATIONS**§ 2. Annexation**

Statutes setting out the involuntary annexation procedure applicable to cities of 5,000 or more do not violate constitutional provisions because certain counties are exempted therefrom. *Campbell v. City of Greensboro*, 252.

§ 2.3. Other Statutory Requirements for Annexation

The trial court properly concluded that a city complied with G.S. 160A-48(e) where the court found upon supporting evidence that in those instances where natural topographic features were not followed, practical reasons existed for not doing so. *Campbell v. City of Greensboro*, 252.

§ 2.4. Remedies to Attack Annexation

The discovery provisions of Rule 26(b)(1) applied to judicial proceedings for the review of annexation ordinances with regard to whether the city followed the statutory procedure, whether the city's plan met statutory requirements, and whether the area to be annexed was eligible for annexation. *Campbell v. City of Greensboro*, 252.

§ 4.4. Public Utilities and Services

Where defendant was the sole provider of electric service in an annexed area, and where both plaintiff and defendant had the willingness and ability to serve, but

MUNICIPAL CORPORATIONS — Continued

plaintiff was not ready to serve, defendant was properly declared a secondary supplier. *Morgan v. Town of Hertford*, 725.

§ 30.5. Particular Factors and Circumstances Considered in Determination as to Validity of Zoning Ordinances

The fact that plaintiff town did not follow the procedures established in its zoning ordinances in handling defendant's case did not *ipso facto* invalidate plaintiff's legislative determination as to proper density and entitle defendant to a permit for the construction of a second building on his property. *Town of Kenansville v. Summerlin*, 601.

§ 30.15. Zoning; Nonconforming Uses Generally

There was no merit to defendant's contention that other landowners had two buildings on their lots and that plaintiff was practicing unfair discrimination by denying him a building permit for a second building on his lot. *Town of Kenansville v. Summerlin*, 601.

NARCOTICS

§ 3.1. Competency and Relevancy of Evidence Generally

Evidence of marijuana, currency and income tax returns was relevant on questions of whether defendants had constructive possession of marijuana and whether they were running a drug business. *S. v. McLamb*, 712.

The State laid an ample foundation for testimony as to the behavior of drug-sniffing dogs. *Ibid*.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The State's evidence was sufficient for the jury in a prosecution for possession of marijuana found in an automobile which had been borrowed by defendant. *S. v. Dow*, 82.

NEGLIGENCE

§ 20. Limitation of Actions

In an action to recover damages arising from a fire in a building housing plaintiffs' condominiums, the statute of repose barred their claims against defendant builders even before the injury occurred. *Colony Hill Condominium I Assoc. v. Colony Co.*, 390.

The six-year statute of repose set forth in G.S. 1-50(5) applied to actions against the developer of a condominium project for negligence in failing to install fire walls in the attics of the condominium buildings. *Starkey v. Cimarron Apartments; Evans v. Cimarron Apartments*, 772.

§ 30. Nonsuit Generally

A directed verdict was correctly entered for defendants because plaintiffs' evidence did not show that anyone was negligent in using hooking rings to lift a pump assembly, although the evidence tended to show that plaintiff was injured because one of the hooking rings failed. *Millikan v. Guilford Mills, Inc.*, 705.

§ 30.2. Nonsuit; Proximate Cause

In an action to recover for the death of a child who was crushed by concrete pipes at a construction site, the trial court properly entered summary judgment for defendant carrier who safely transported and delivered the pipes to the work site. *Broadway v. Blythe Industries, Inc.*, 435.

NEGLIGENCE — Continued**§ 36. Nonsuit for Intervening Negligence**

In an action to recover for the death of a child crushed by concrete pipes at a construction site, the installer's alleged intervening negligence insulated, as a matter of law, any alleged negligence of the carrier who delivered the pipes to the work site. *Broadway v. Blythe Industries, Inc.*, 435.

§ 50.1. Other Conditions or Uses of Lands and Buildings

The trial court properly refused to give a requested instruction which would have made defendants liable for the negligence of plumbers in failing to discover the disrepair of pipes on defendant's property even though defendants had used due care in hiring them. *Superior Tile v. Rickey Office Equipment*, 258.

§ 57.6. Sufficiency of Evidence in Actions by Invitees; Slippery Floors

The trial court properly directed verdict for defendant in an action to recover for personal injuries sustained when plaintiff slipped and fell in a puddle of pickle juice in defendant's store. *France v. Winn-Dixie Supermarket*, 492.

PARENT AND CHILD**§ 1. Termination of Relationship**

The trial court erred in ruling that parental rights should be terminated on the grounds that the parents had willfully left the child in foster care for more than 2 consecutive years without taking certain corrective actions and that the parents had failed to provide any support for the child for 6 months preceding the action. *In re Johnson*, 383.

Evidence was sufficient to support the trial court's finding that a child was neglected, and that finding supported its conclusion that parental rights should be terminated. *Ibid.*

Evidence was sufficient to support the trial court's conclusion that a child was neglected, and it was within the discretion of the court as to whether to terminate parental rights. *In re Webb*, 345.

§ 2.2. Child Abuse

The evidence was not sufficient to establish a violation of G.S. 14-318.2(a) by allowing physical injury to be inflicted upon defendant's child when it showed that defendant was not present in the room where the child was injured and that defendant became aware of the abuse of the child only after it occurred. *S. v. Woods*, 584.

PARTITION**§ 6.1. Necessity for Sale**

The trial court properly ordered that property owned by the parties as tenants in common be sold rather than divided in kind. *Bomer v. Campbell*, 137.

PAYMENT**§ 4. Burden of Proof; Pleading**

Defendants were entitled to summary judgment for an unpaid rental payment due under a lease where plaintiff filed a conclusory affidavit stating merely that the payment had been "made." *Murphrey v. Winslow*, 10.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 17.1. Sufficiency of Evidence of Failure to Inform Patient of Risks

Summary judgment was improperly entered for defendant surgeons in a malpractice action based on alleged negligence by defendants in failing to obtain plaintiff's informed consent to a surgical procedure. *Estrada v. Jaques*, 627.

A health care provider who offers an experimental procedure or treatment to a patient has a duty to inform the patient of the experimental nature of the procedure and the risks thereof. *Ibid.*

PLEADINGS

§ 33. Amendment of Pleadings to Conform to Proof

Plaintiff was not prejudiced by the court's denial of its motion to amend the complaint to conform to the evidence. *Superior Tile v. Rickey Office Equipment*, 258.

PROCESS

§ 2. Issuance and Service in General

When a plaintiff has obtained an order to extend the time for filing the complaint and timely files the complaint before service of the summons, simultaneous service of the complaint and an alias or pluries summons without the order extending the time for filing the complaint constitutes valid process which keeps alive the original filing date. *Childress v. Forsyth County Hospital Auth.*, 281.

§ 3.1. Alias and Pluries Summons

An alias or pluries summons was not invalid because it referred to the original summons rather than to the subsequent delayed filing of the complaint. *Childress v. Forsyth County Hospital Auth.*, 281.

PROPERTY

§ 4.2. Criminal Prosecution for Wilful Destruction of Property; Sufficiency of Evidence

The trial court did not err in denying defendant's motions to dismiss the charge of wilful and wanton damage to desks, drawers, and cabinets in excess of \$200, though there was no precise evidence as to the amount of the damages. *S. v. Edmondson*, 426.

PUBLIC OFFICERS

§ 12. Removal from Office

An employee subject to the State Personnel Act who held a "trainee" appointment did not have a property interest in her continued employment which entitled her to the protection of the Due Process Clause of the Fourteenth Amendment. *Yow v. Alexander Co. Dept. of Soc. Serv.*, 174.

QUASI CONTRACTS AND RESTITUTION

§ 1.2. Unjust Enrichment

A contingent fee contract in a domestic relations case was void as against public policy, but plaintiff attorneys were entitled to recover in *quantum meruit* for the reasonable value of their services. *Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson*, 147.

QUIETING TITLE

§ 2.2. Burden of Proof; Evidence

The trial court in an action to quiet title erred in denying plaintiff's motion for partial summary judgment and in finding sufficient evidence of adverse possession under seven years color of title to divest plaintiff of any title to the lands where plaintiff presented prima facie evidence that she owned the property by establishing a marketable title as provided in G.S. 47B-2(a), and where defendants' answer was not verified and defendants failed to support their contentions of adverse possession by any factual showing. *Harris v. Walden*, 616.

RAILROADS

§ 5. Crossing Accidents Generally

The evidence was sufficient to permit the jury to find that defendant's driver was negligent in executing a turn-around of his tanker truck on a train crossing and in failing to move his truck from the crossing until the train was less than 50 feet away and that such negligence was a proximate cause of injuries sustained by railway company employees when they jumped from the moving train because they thought the train was going to collide with the truck. *Southern Railway Co. v. O'Boyle Tank Lines*, 1.

RAPE AND ALLIED OFFENSES

§ 5. Sufficiency of Evidence

The evidence was insufficient to show that defendant *forcibly* raped his daughter. *S. v. Lester*, 757.

RECEIVING STOLEN GOODS

§ 1. Nature and Elements of Offense

Defendant was properly tried for possessing stolen goods rather than for receiving or transferring stolen vehicles because the automobile had been disassembled. *S. v. Craver*, 555.

REGISTRATION

§ 4. Priorities

A deed of trust to a bank registered after the debtor acquired title had priority over a deed of trust registered prior to the time the debtor acquired title even though the bank had actual notice of the prior deed of trust. *Schuman v. Roger Baker and Assoc.*, 313.

ROBBERY

§ 1. Nature and Elements of Offense

Forcible trespass to real property under G.S. 14-126 is not a lesser included offense of common law robbery. *S. v. Bates*, 477.

§ 4.2. Sufficiency of Evidence of Common Law Robbery

In a prosecution for common law robbery, evidence was sufficient to show the requisite felonious intent at the time the taking occurred to deprive the owner permanently of his property. *S. v. Bates*, 477.

ROBBERY — Continued**§ 4.3. Sufficiency of Evidence of Armed Robbery**

The State's evidence was sufficient to show that items of personal property found 500 feet from the crime scene were taken with the intent permanently to deprive the owner of them so as to support defendant's conviction of armed robbery. *S. v. Rawls*, 230.

Evidence that one robber held a sawed-off shotgun less than a foot from a storekeeper's body was sufficient to prove that defendant endangered or threatened the storekeeper's life so as to support conviction of defendant for armed robbery. *S. v. Ford*, 244.

There was sufficient evidence to support a defendant's conviction of armed robbery where there was evidence that defendant had made threats which helped control the victim's movements and had participated in a conversation in which incriminating statements had been made. *S. v. Rutherford*, 674.

§ 5.4. Instructions on Lesser Included Offenses

In a prosecution for robbery with a dangerous weapon, the trial court did not err in failing to instruct on the lesser offense of common law robbery; however, the court did err in failing to instruct on simple assault as a lesser offense, but such error was not prejudicial. *S. v. Tarrant and S. v. Davis*, 449.

§ 6. Verdict

Defendants could properly be convicted of two counts of armed robbery where they held a husband and wife at gunpoint and took personal property belonging to each. *S. v. Wheeler*, 191.

RULES OF CIVIL PROCEDURE**§ 15. Amended and Supplemental Pleadings**

Plaintiff's original complaint alleging that defendant surgeons were negligent in failing to obtain his informed consent to a steel coil embolization gave defendants notice of the transactions to be proved pursuant to an amendment alleging that defendants were negligent in their treatment of plaintiff after the embolization so that the amendment related back to the filing of the original complaint. *Estrada v. Jaques*, 627.

§ 17. Parties Plaintiff and Defendant; Capacity

Although purported assignments of claims to recover for injuries allegedly caused by defendant's negligence were void as against public policy, the trial court could properly direct that the injured persons be made parties to the action as of the date of filing of the first complaint pursuant to G.S. 1A-1, Rule 17. *Southern Railway Co. v. O'Boyle Tank Lines*, 1.

§ 26. Depositions in a Pending Action

The discovery provisions of Rule 26(b)(1) applied to judicial proceedings for the review of annexation ordinances with regard to whether the city followed the statutory procedure, whether the city's plan met statutory requirements, and whether the area to be annexed was eligible for annexation. *Campbell v. City of Greensboro*, 252.

§ 41. Dismissal of Actions Generally

G.S. 1A-1, Rule 41(b) does not authorize the court to dismiss an action *ex mero motu* for failure to prosecute. *Simmons v. Tuttle*, 101.

RULES OF CIVIL PROCEDURE — Continued**§ 52.1. Findings by Court; Particular Cases**

Petitioner was not prejudiced by the failure of the trial court to state separately its findings of fact and conclusions of law in an order quashing an administrative inspection warrant. *Brooks, Comr. of Labor v. Butler*, 681.

§ 56. Summary Judgment

The trial court did not err in denying defendant's oral motion for continuance of a summary judgment hearing made on the ground that defendant's retained counsel was scheduled to argue in the Supreme Court on the day of the hearing where the trial court decided that an associate who made the motion could properly represent defendant at the hearing. *Gillis v. Whitley's Discount Auto Sales*, 270.

§ 56.1. Summary Judgment; Timeliness of Motion

Although plaintiff's filing of an affidavit on the day of the hearing of a motion for summary judgment violated the technical requirements of Rule 6(d), admission of the affidavit was not prejudicial error. *Gillis v. Whitley's Discount Auto Sales*, 270.

A motion for summary judgment should not have been heard without the ten days notice required by Rule 56(c), even though the case had been calendared for trial on the date the motion was heard and even though the parties were present to argue a motion for a change of venue. *Tri City Building Components v. Plyler Construction*, 605.

§ 56.3. Summary Judgment; Necessity for and Sufficiency of Supporting Material; Moving Party

The trial court erred in granting plaintiffs' motion for summary judgment where plaintiffs and defendants presented contradictory affidavits alleging specific facts based on personal knowledge. *Hyde v. Taylor*, 523.

§ 56.4. Summary Judgment; Necessity for and Sufficiency of Supporting Material; Opposing Party

Partial summary judgment was proper where defendants presented no evidence indicating that they did not discover or should not have discovered any fraud until within three years of the filing of their counterclaim. *Hyde v. Taylor*, 523.

§ 60.2. Grounds for Relief from Judgment or Order

The trial court erred in denying plaintiff's motion for relief from an order of dismissal where the record showed that plaintiff's counsel did not report to the court or attend the call of the clean-up calendar, and negligence of counsel in failing to appear was not imputable to plaintiff. *Simmons v. Tuttle*, 101.

§ 65. Injunctions

A temporary order enjoining the transfer of certain marital assets could not be continued by the court's adoption of those provisions of the temporary order not inconsistent with its final order. *Spencer v. Spencer*, 159.

SALES**§ 2. Delivery of Goods**

Plaintiffs' claims against defendant manufacturers of a prefabricated fireplace were barred by G.S. 1-50(6). *Colony Hill Condominium I Assoc. v. Colony Co.*, 390.

SALES — Continued**§ 6.4. Warranties in Sale of House by Builder-Vendor**

The implied warranty of habitability extends to all sales of residential housing by a builder-vendor to the initial vendee within the maximum statute of limitations period of 10 years, and it does not matter that renters may have lived in the house during those years. *Gaito v. Auman*, 21.

§ 22.1. Defective Goods; Seller's Liability

Summary judgment on a counterclaim for damages from the collapse of roof trusses was erroneous where there was evidence that substandard lumber in a truss had caused the collapse. *Tri City Building Components v. Plyler Construction*, 605.

SEALS**§ 1. Generally**

Where a lease was executed under seal, the lessor's grantees were entitled to the 10-year statute of limitations for sealed instruments without a formal assignment of the lease itself. *Murphrey v. Winslow*, 10.

There was no merit to plaintiff's contention that the jury could have found that the contract between the parties was under seal because defendant's corporate seal was placed on the contract. *Square D Co. v. C. J. Kern Contractors*, 30.

SEARCHES AND SEIZURES**§ 1. Generally**

Defendants had no reasonable expectation of privacy as to vehicles which were in rough, undeveloped areas and appeared to be abandoned. *S. v. McLamb*, 712.

§ 3. Searches at Particular Places

The trial court erred in denying defendant's motion to suppress marijuana evidence made on the ground that the marijuana was obtained from within defendant's curtilage without either a search warrant or circumstances justifying an exception to the warrant requirement. *S. v. Burch*, 444.

§ 5. Plain View Rule

The State could not argue that a warrantless seizure of marijuana plants was made pursuant to the "plain view" doctrine. *S. v. Burch*, 444.

§ 11. Search and Seizure of Vehicles on Probable Cause

An officer had probable cause to believe that a vehicle and its occupants had been involved in an armed robbery so that a search of the vehicle for contraband was lawful. *S. v. Ford*, 244.

§ 19. Validity of Warrant in General

Respondent was not entitled to notice and an opportunity to be heard on an application for an administrative inspection warrant. *Brooks, Comr. of Labor v. Butler*, 681.

§ 23. Application for Warrant; Sufficiency of Showing of Probable Cause

A motion to suppress evidence seized under a search warrant was properly denied where the supporting affidavit was sufficient. *S. v. Craver*, 555.

SEARCHES AND SEIZURES — Continued

An application for an administrative inspection warrant set forth factual information sufficient to enable the magistrate to make an independent determination of the existence of probable cause. *Brooks, Comr. of Labor v. Butler*, 681.

An affidavit was sufficient to support a finding of probable cause to believe that an entire six-acre tract of land was used in a drug business. *S. v. McLamb*, 712.

§ 24. Application for Warrant; Sufficiency of Showing of Probable Cause; Information from Informers

An application for a search warrant adequately established the credibility of an informant. *S. v. Walker*, 403.

§ 31. Contents of Warrant; Description of Property to Be Seized

An administrative inspection warrant was not overbroad because it authorized inspection of "all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials, and all other things." *Brooks, Comr. of Labor v. Butler*, 681.

§ 37. Scope of Search Incident to Arrest; Vehicles

Envelopes and wallets in defendant's car were potential "containers" of evidence and could be the subject of a warrantless search. *S. v. Hopkins*, 530.

§ 39. Time of Execution of Search Warrant

A search of defendant's apartment for cocaine pursuant to a warrant was not unreasonable because it was accomplished at night. *S. v. Edwards*, 317.

The scope of a warrant to search a six-acre tract of land was not exceeded by the search of a vehicle not parked on the tract. *S. v. McLamb*, 712.

§ 41. Conduct of Officers in Executing Search Warrant

Officers executing a warrant to search defendant's apartment for cocaine complied with the knock and announce requirements of G.S. 15A-249, and authority of the officers forcibly to enter the premises was established by proof that approximately 30 seconds went by without a response to their knock and announcement. *S. v. Edwards*, 317.

STATE**§ 8.2. Negligence of State Employee; Particular Actions**

Plaintiff's damages from the revocation of his driver's license were not proximately caused by the negligence of an assistant clerk of court in reporting to the Department of Motor Vehicles that defendant had been convicted of driving under the influence when in fact he had pled guilty to careless and reckless driving. *Register v. Administrative Office of the Courts*, 763.

TAXATION**§ 22.1. Property of Religious and Charitable Institutions; Particular Properties and Uses**

A residential retirement center operated by a non-profit corporation formed by a church was not being used for a charitable purpose so as to qualify for exemption from *ad valorem* taxes. *In re Appeal of Barham*, 236.

TAXATION — Continued**§ 28.5. Assessment of Additional Individual Income Tax**

Where plaintiff employee was required to pay additional income taxes because his per diem payments for business expenses exceeded his actual expenses, defendant employer did not breach any legal duty to plaintiff even if the employer failed to establish adequate accounting procedures to make sure that the amounts paid out did not exceed plaintiff's necessary expenses. *Tyson v. Carolina Telephone*, 593.

§ 31. Sales and Use Taxes

Respondent corporate officer could be held personally liable for unpaid sales and use taxes, and there was no merit to his contention that, in order to be liable for the taxes, he had to have possession of corporate funds at the time when the corporation owed state taxes and allowed the funds to be paid out or distributed to the stockholders. *In re Petition of Jonas*, 116.

§ 40. Foreclosure of Tax Certificate

The evidence supported the jury's verdict finding that a county failed to provide notice at plaintiff's last known address as required by G.S. 105-375 for the sale of a tax lien under in rem foreclosure procedures. *Howell v. Treece*, 322.

Where plaintiff did not receive the required statutory notice of in rem tax foreclosure proceedings which culminated in a sale of plaintiff's land to defendants, no statute of limitations could bar plaintiff's action to invalidate the sale. *Ibid*.

TRESPASS**§ 12. Nature and Elements of Criminal Trespass**

Forcible trespass to real property under G.S. 14-126 is not a lesser included offense of common law robbery. *S. v. Bates*, 477.

TRIAL**§ 3.1. Motions for Continuance; Discretion of Trial Judge**

The trial court did not abuse its discretion in denying defendant's motion to continue a hearing on a summary judgment motion. *Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 742.

§ 3.2. Particular Grounds for Motions for Continuance

The trial court did not err in denying defendant's oral motion for continuance of a summary judgment hearing made on the ground that defendant's retained counsel was scheduled to argue in the Supreme Court on the day of the hearing where the trial court decided that an associate who made the motion could properly represent defendant at the hearing. *Gillis v. Whitley's Discount Auto Sales*, 270.

Defendant was not denied an adequate time to prepare his case by the denial of his motion to continue because only five days elapsed from the time defendant began discovery on amended issues until the trial. *Marcoin, Inc. v. McDaniel*, 498.

§ 5.1. Sequestration of Witnesses

The decision to sequester witnesses lay within the trial court's discretion. *Spencer v. Spencer*, 159.

§ 10.1. Court's Expression of Opinion on the Evidence; Particular Cases

The trial judge did not show undue favoritism toward the wife in a domestic relations case when he required the husband's counsel to define "jealousy" after

TRIAL — Continued

counsel had repeatedly asked the wife whether she was jealous. *Spencer v. Spencer*, 159.

The trial judge did not express an opinion in commenting to the attorneys, "I don't want you gentlemen to play games," or in stating, "I don't want any to the best of your knowledge." *Marcoin, Inc. v. McDaniel*, 498.

§ 10.2. Court's Remarks to or Respecting Witnesses Generally

The trial judge did not express an opinion on the credibility of a witness when he stated, "The witness is under oath and the court assumes her testimony is truthful." *Spencer v. Spencer*, 159.

§ 11. Arguments and Conduct of Counsel

There was no prejudice from the trial court's refusal to allow defendants' attorney during closing argument to read from a deed which had been admitted and passed among the jury. *Lambe-Young, Inc. v. Cook*, 588.

§ 58. Findings and Judgment of the Court

The trial court's findings were insufficient to resolve the issues in an action on a contract for the construction of a house. *Waynick Construction v. York*, 287.

UNFAIR COMPETITION**§ 1. Unfair Trade Practices in General**

The trial court erred in holding that there was no unfair or deceptive trade practice where there was evidence of a misrepresentation during sale. *Strickland v. A & C Mobile Homes*, 768.

In an unfair trade practice case the benefit of the bargain rule applies to damages, so that it was error to consider expenses plaintiffs would have had even if the representation had been true, or to consider speculative evidence of a deficiency on a mortgage debt. *Ibid*.

Plaintiffs' failure to explain orally to defendants their right to cancel a contract for home improvements at the time the agreement was signed, coupled with defective notice of cancellation which was incomplete and unattached to the contract, constituted an unfair and deceptive act in violation of G.S. 75-1.1. *Eastern Roofing and Aluminum Co. v. Brock*, 431.

G.S. Chapter 58 does not provide the exclusive remedy for those damaged by unfair trade practices in the insurance industry, and allegations of unfair fixing of insurance rates should be permitted to be raised under G.S. 75-5 as well. *Phillips v. Integon Corp.*, 440.

Defendant violated the statute prohibiting false advertising by personnel agencies by advertising that "pre-screened, qualified applicants" were quickly available through it when the work experience and reliability of the applicants had not been determined. *Winston Realty Co. v. G.H.G., Inc.*, 374.

Contributory negligence is not a defense in an unfair trade practices action. *Ibid*.

The Unfair Trade Practices Act applied to defendant's activities in recommending employees to plaintiff and other employers. *Ibid*.

WILLS**§ 35. Time of Vesting of Estates**

Where a corporate resolution required the payment of the corporate president's salary after his death "to his widow or if then deceased to his issue," the entire amount vested in the widow because she was not "then deceased" at her husband's death. *McDowell v. Smathers Super Market*, 775.

WITNESSES**§ 7. Refreshing Memory**

A deposition was not admissible as past recollection recorded. *Superior Tile v. Rickey Office Equipment*, 258.

WORD AND PHRASE INDEX

ACCELERATOR

Sticking open, *Short v. General Motors Corp.*, 454.

ADMINISTRATION OF ESTATE

Voluntarily dismissed suit as claim against estate, *In re Watson*, 120.

ADMINISTRATIVE INSPECTION WARRANT

Probable cause for issuance, *Brooks, Comr. of Labor v. Butler*, 681.

ADULTERY

Opportunity alone insufficient, *Wallace v. Wallace*, 458.

AD VALOREM TAXES

Residential retirement center not exempt as charity, *In re Appeal of Barham*, 236.

AGGRAVATING CIRCUMSTANCES

Age of victims in armed robbery improper factor, *S. v. Wheeler*, 191.

Escape during trial, *S. v. Kornegay*, 579.

Incest victim very young, *S. v. Jackson*, 782.

Necessity to deter others, *S. v. Wheeler*, 191.

Premeditation and deliberation, *S. v. Monroe*, 462.

Previous rape of victim, *S. v. Covel*, 490.

Same evidence to support different factors, *S. v. Wheeler*, 191.

AIDING AND ABETTING

Driving automobile to crime scene, *S. v. Dow*, 82.

AIR CONDITIONING

Implied warranty of habitability, *Gaito v. Auman*, 21.

AIRLINE FLIGHT

Formation of fistula, *Smith v. DHL Corp.*, 124.

ALIAS SUMMONS

Reference to delayed filing of complaint, *Childress v. Forsyth County Hospital Auth.*, 281.

ALIMONY

Acceptance of late payment, *Cator v. Cator*, 719.

Continuance of temporary order, necessity for specific findings, *Spencer v. Spencer*, 159.

Female staying with defendant, competency to show living expenses, *Spencer v. Spencer*, 159.

Insufficient findings by court, *Spencer v. Spencer*, 159.

Possession of marital home, *Minor v. Minor*, 76.

Willful failure to support not res judicata as to depression of income, *Spencer v. Spencer*, 159.

ALLEY

Easement in, *Knott v. Washington Housing Authority*, 95.

AMENDMENT OF COMPLAINT

Relation back in malpractice action, *Estrada v. Jaques*, 627.

ANNEXATION

Applicability of discovery procedures, *Campbell v. City of Greensboro*, 252.

Constitutionality of statutes, *Campbell v. City of Greensboro*, 252.

ANNEXATION — Continued

Electric service, *Morgan v. Town of Hertford*, 725.

Following natural topographic features, *Campbell v. City of Greensboro*, 252.

ANTI-DEFICIENCY JUDGMENT STATUTE

Inapplicable where security released, *Barnaby v. Boardman*, 299.

No deficiency, *Hyde v. Taylor*, 523.

Second purchase money deed of trust, *Blanton v. Sisk*, 70.

APPEAL

Dismissal of claim without prejudice not appealable, *Johnson v. N. C. Dept. of Transportation*, 784.

ARBITRATION

Waiver by conduct, *Servomation Corp. v. Hickory Construction Co.*, 309.

ARCHITECTS

Statute of limitations, *Square D Co. v. C. J. Kern Contractors*, 30.

ARMED ROBBERY

Endangering life by use of shotgun, *S. v. Ford*, 244.

Intent permanently to deprive owner of property, *S. v. Rawls*, 230.

ARSON

Solicitation of another, *S. v. Hicks*, 611.

ASSISTANT CLERK OF COURT

Action to recover on promissory note, *Blanton v. Sisk*, 70.

Negligence not cause of damages from revocation of driver's license, *Register v. Administrative Office of the Courts*, 763.

ATTORNEYS' FEES

Amount for support staff, *Sloop v. Friberg*, 690.

ATTORNEYS' FEES — Continued

Collection of note, inclusion of fees for related actions, *Coastal Production v. Goodson Farms*, 221.

Contingent fee contract for domestic case invalid, *Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson*, 147.

Fees for wife represented by two attorneys, *Spencer v. Spencer*, 159.

Insurer's unwarranted refusal to pay, *McDaniel v. N. C. Mutual Life Ins. Co.*, 480.

No waiver of appeal by consent judgment, *Coastal Production v. Goodson Farms*, 221.

Notice of intention to enforce note provision, *Coastal Production v. Goodson Farms*, 221.

Range permitted by note and statute, *Coastal Production v. Goodson Farms*, 221.

BACK-UP BELL

Negligence in failing to maintain, *Briggs v. Morgan*, 57.

BANK RECORDS

Order to produce, *In re Superior Court Order*, 63.

BENEFIT OF BARGAIN RULE

Unfair trade practices, *Strickland v. A & C Mobile Homes*, 768.

BILLBOARD

Revocation of permit for parking on shoulder of highway, *Ace-Hi, Inc. v. Dept. of Transportation*, 214.

BOND

Requirement of at resale of property improper, *Bomer v. Campbell*, 137.

BREAKING AND ENTERING

Constructive breaking by trickery, *S. v. Wheeler*, 191.

BREAKING AND ENTERING**— Continued**

Necessity to allege felony intended, *S. v. Vick*, 338.

Separate offense from larceny, *S. v. Edmondson*, 426.

BRIDGE ABUTMENT

Struck by pickup truck, *Short v. General Motors Corp.*, 454.

BUILDING PERMIT

Denial of, *Town of Kenansville v. Summerlin*, 601.

BUSINESS RECORDS

Employee time card, *S. v. Vick*, 338.

CANCELLATION OF CONTRACT

For home improvements, *Eastern Roofing and Aluminum Co. v. Brock*, 431.

CHARACTER WITNESS

Cross-examination about prior pleas by defendants, *S. v. McLamb*, 712.

CHARITABLE EXEMPTION

Residential retirement center not entitled to, *In re Appeal of Barham*, 236.

CHILD ABUSE

Inflicted by third party, *S. v. Woods*, 584.

CHILD CUSTODY

Change of circumstances, *O'Briant v. O'Briant*, 360.

Emotional fitness of parent, *O'Briant v. O'Briant*, 360.

Failure to comply with order criminal contempt, *Mather v. Mather*, 106.

Jurisdiction, *Sloop v. Friberg*, 690.

Punishment for contempt, *Bethea v. McDonald*, 566.

CHILD CUSTODY — Continued

Reduction of child support to enforce visitation rights, *Mather v. Mather*, 106.

Restriction on visitation, *Sloop v. Friberg*, 690.

CHILD SUPPORT

Age of majority, *Boyles v. Boyles*, 415.

Enforcement by contempt, *Brower v. Brower*, 131.

Estate of children, *Sloop v. Friberg*, 690.

Insufficient findings by court, *Spencer v. Spencer*, 159.

Orthodontic expense, *Boyles v. Boyles*, 415.

Private school tuition, *Spencer v. Spencer*, 159.

Room and board for college students, *Boyles v. Boyles*, 415.

Sufficiency of findings, *Sloop v. Friberg*, 690.

Value of parsonage, *Sloop v. Friberg*, 690.

CHILD VISITATION

Interference with, *O'Briant v. O'Briant*, 360.

CLEAN-UP CALENDAR

Attorney's failure to appear, *Simmons v. Tuttle*, 101.

CONDOMINIUMS

Defective prefabricated fireplace, *Colony Hill Condominium I Assoc. v. Colony Co.*, 390.

Inadequate fire walls not basis for punitive damages, *Starkey v. Cimarron Apartments*; *Evans v. Cimarron Apartments*, 772.

Statute of repose applicable to developer, *Starkey v. Cimarron Apartments*; *Evans v. Cimarron Apartments*, 772.

CONFESSION

Induced by Tennessee authorities, *S. v. Richardson*, 509.

CONSOLIDATION OF CHARGES

Crimes in different counties, no transactional connection, *S. v. Smith*, 293.

CONSTRUCTION CONTRACT

Substantial performance, action for non-apparent defects, *Waynick Construction v. York*, 287.

CONSTRUCTION SITE

Children injured by concrete pipes, *Broadway v. Blythe Industries, Inc.*, 435.

CONTINGENT FEE AGREEMENT

Invalid in domestic relations case, *Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson*, 147.

CONTINUANCE

Denial of, hearing conducted by associate counsel, *Gillis v. Whitley's Discount Auto Sales*, 270.

CONTRACTS

Agent's agreement to make payments for third party, *Forbes Homes, Inc. v. Trimpi*, 614.

CONTRIBUTORY NEGLIGENCE

Continuing to ride with defendant, insufficient evidence, *Watson v. Storie*, 327.

Error relating to, retrial of negligence issue, *Watson v. Storie*, 327.

CORPORATE OFFICER

Personal liability for unpaid sales and use taxes, *In re Petition of Jonas*, 116.

CORPORATE OFFICER—Continued

Salary payments after death of, *McDowell v. Smathers Super Market*, 775.

CORPORATE SEAL

Statute of limitations, *Square D Co. v. C. J. Kern Contractors*, 30.

CORPORATION

Constitutional right to privacy, *In re Superior Court Order*, 63.

COVENANTS NOT TO COMPETE

Preliminary injunction proper, *Robins & Weill v. Mason*, 537.

CURTILAGE

Marijuana within, *S. v. Burch*, 444.

DEAD MAN'S STATUTE

Surviving party with identical interest, *Lambe-Young, Inc. v. Cook*, 588.

DENIAL OF GUILT

Exclusion of testimony prejudicial error, *S. v. Lassiter*, 731.

DISAFFIRMANCE

Minor's purchase of car, *Gillis v. Whitley's Discount Auto Sales*, 270.

DISCOVERY

Applicability to annexation proceeding, *Campbell v. City of Greensboro*, 252.
Statements of State's witnesses not discoverable, *S. v. Beam*, 181.

DIVORCE

Residency requirement, *Chamberlin v. Chamberlin*, 474.

DOCTRINE OF NECESSARIES

Party responsible for rent, *Maxton Housing Authority v. McLean*, 550.

DOGS

Testimony as to behavior in drug case,
S. v. McLamb, 712.

DRIVER'S LICENSE

Damages from revocation not caused by assistant clerk's negligence, *Register v. Administrative Office of the Courts*, 763.

Suspension of judgment debtor's, *Wilfong v. Wilkins, Com'r of Motor Vehicles*, 127.

DRUG USE

Mitigating factor, *S. v. Grier*, 40.

EASEMENT

Implied from prior use in alley, *Knott v. Washington Housing Authority*, 95.

EJECTMENT

Nonpayment of utilities, *Maxton Housing Authority v. McLean*, 550.

Party responsible for rent, *Maxton Housing Authority v. McLean*, 550.

ELECTRIC SERVICE

Area annexed by another municipality, *Morgan v. Town of Hertford*, 725.

EMPLOYEE TIME CARD

Admissibility as business record, *S. v. Vick*, 338.

EMPLOYMENT AGENCY

Unfair trade practice, *Winston Realty Co. v. G.H.G., Inc.*, 370.

EQUITABLE DISTRIBUTION

Lot devised to husband by his father separate property, *Crumbley v. Crumbley*, 143.

Physical abuse improperly considered, *Hinton v. Hinton*, 665.

EQUITABLE MORTGAGE

No obligation to redeem property, *Eagle's Nest, Inc. v. Malt*, 397.

ESTOPPEL BY DEED

Inapplicable where deed of trust registered before title acquired, *Schuman v. Roger Baker and Assoc.*, 313.

EXCESS INSURANCE

Clauses mutually repugnant, *Alliance Mutual Ins. Co. v. N. Y. Central Ins. Co.*, 140.

EXECUTOR

Venue of action against, *DesMarais v. Dimmette*, 134.

EXPERT TESTIMONY

Personal knowledge not required, *Waynick Construction v. York*, 287.

EXPRESSION OF OPINION

Statement of assumption that testimony is truthful, *Spencer v. Spencer*, 159.

FAILURE TO PROSECUTE

Dismissal by court, *Simmons v. Tuttle*, 101.

FALSE PRETENSE

Distinguished from passing worthless checks, *S. v. Hopkins*, 530.

Employment status, *S. v. Hopkins*, 530.

FIDUCIARY RELATIONSHIP

Constructive fraud in administering trust funds, *Stilwell v. Walden*, 543.

FIRE INSURANCE

Production of tax returns as condition to collection of damages, *Lee v. State Farm Fire and Casualty Co.*, 575.

FIREPLACE

Prefabricated, statute of repose, *Colony Hill Condominium I Assoc. v. Colony Co.*, 390.

FISTULA

Consequence of airline flight, injury arising out of employment, *Smith v. DHL Corp.*, 124.

FORFEITURE

Inapplicable to money paid to undercover agent, *S. v. Triplett*, 341.

FOURTH OF JULY

Notice of appeal, *Hardy v. Floyd*, 608.

FRAUD

Insufficient evidence of for licensing agreements, *Marcoin, Inc. v. McDaniel*, 498.

FRAUDULENT CONVEYANCES

Adequacy of consideration, *Smith-Douglas v. Kornegay; First-Citizens Bank v. Kornegay*, 264.

GARAGE LIABILITY POLICY

Owner helping start customer's vehicle, *Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 742.

GARBAGE TRUCK

Back-up bell, *Briggs v. Morgan*, 57.

HEARSAY

Indictment based on, *S. v. Beam*, 181.
Statement showing knowledge by defendant was not, *S. v. Beam*, 181.

HITCHHIKER

Robbery of, *S. v. Rutherford*, 674.

HORSEPLAY

Covered under Workers' Compensation Act, *Bare v. Wayne Poultry Co.*, 88.

HOUSING AUTHORITY

Ejectment, *Maxton Housing Authority v. McLean*, 550.

IDENTIFICATION OF DEFENDANT

Evidence of description of third party, *S. v. Woodruff*, 561.

Independent origin of in-court identification from photographic identification, *S. v. Grier*, 40; *S. v. Lassiter*, 731.

Photographic procedure not suggestive, *S. v. Ford*, 244.

Pretrial showup, no likelihood of misidentification, *S. v. McNair*, 331.

ILLEGITIMATE CHILD

Failure to support, *S. v. Hobson*, 619.

IMPEACHMENT OF WITNESS

Plea bargain, *S. v. Rutherford*, 674.

Prior criminal acts, good faith basis, *S. v. McNair*, 331.

IMPLIED WARRANTY OF HABITABILITY

For air conditioning in four and a half year old house, *Gaito v. Auman*, 21.

IMPORTANT INTERNAL ORGANS

Testicles and spermatic cord, *Sparks v. Sailors' Snug Harbor*, 596.

INDICTMENT

Hearsay evidence as basis, *S. v. Beam*, 181.

INFORMANT

Credibility of in application for search warrant, *S. v. Walker*, 403.

Motion for disclosure of identity denied, *S. v. Walker*, 403; *S. v. Craver*, 555.

INFORMED CONSENT

Steel coil embolization procedure, *Es-trada v. Jaques*, 627.

INSIDE TRADING

Liability of broker, *Skinner v. E. F. Hutton & Co.*, 517.

INSURANCE

Notice of claims delivered to agent, *City of Greensboro v. Reserve Insurance Co.*, 651.

INSURANCE AGENCY

Covenant not to compete, *Robins & Weill v. Mason*, 537.

INSURANCE PREMIUMS

Method of calculation of additional premium, *Fireman's Fund Ins. Co. v. Williams Oil Co.*, 484.

INSURANCE RATES

Unfair trade practice in fixing, *Phillips v. Integon Corp.*, 440.

INTERLOCUTORY APPEAL

Vacation of judgment and new trial, *S. v. Howard*, 487.

INTERROGATORIES

Authority of Deputy Commissioner to submit, *Sparks v. Sailors' Snug Harbor*, 596.

JOINDER

Crimes in different counties, no transactional connection, *S. v. Smith*, 293.

JOINT OBLIGORS

Contribution, *Holcomb v. Holcomb*, 471.

JUDGMENT DEBTOR

Suspension of driver's license, *Wilfong v. Wilkins, Com'r of Motor Vehicles*, 127.

JURISDICTION

Foreign corporation, *Sola Basic Industries v. Electric Membership Corp.*, 737.

General appearance, *Bethea v. McDonald*, 566.

JUROR

Acquaintance with defendant's probation officer, *S. v. Kornegay*, 580.

Conversation with witness, *S. v. Ruth-erford*, 674.

JURY ARGUMENT

Prosecutor's characterization of crime as terrible, *S. v. Spears*, 747.

KIDNAPPING

Variance between indictments and instructions, *S. v. Woodruff*, 561.

KNIFE

Employee's injury during horseplay with, *Bare v. Wayne Poultry Co.*, 88.

LARCENY

And possession of stolen goods, conviction of both improper, *S. v. Dow*, 82.
Separate offense from breaking or entering, *S. v. Edmondson*, 426.

LEASE

Manner of payment, *Murphrey v. Winslow*, 10.

Under seal, statute of limitations, *Murphrey v. Winslow*, 10.

LIABILITY INSURANCE

Distinguished from indemnity insurance, *City of Greensboro v. Reserve Insurance Co.*, 651.

LICENSING AGREEMENT

Construction of fee provisions, *Mar-coin, Inc. v. McDaniel*, 498.

LICENSING AGREEMENT**—Continued**

Insufficient evidence of fraud, *Marcoin, Inc. v. McDaniel*, 498.

LIFE ESTATE

Death of life tenant after lease, entitlement to rent, *Coleman v. Edwards*, 206.

LIFT TRUCK

Statute of repose, *Davis v. Mobilift Equipment Co.*, 621.

MALNUTRITION

Neglect of child, *In re Webb*, 345.

MALPRACTICE

Informed consent to steel coil embolization procedure, *Estrada v. Jaques*, 627.

MARIJUANA

Constructive possession of, *S. v. Dow*, 82.

Within curtilage, *S. v. Burch*, 444.

MARKETABLE TITLE

Adverse possession, *Harris v. Walden*, 616.

MEDICAL INSURANCE

Preexisting sickness exclusion, *McDaniel v. N. C. Mutual Life Ins. Co.*, 490.

MEDICAL TESTIMONY

Opinion as to character of metallic artifacts in victim's head, *S. v. Spears*, 747.

MINIMUM CONTACTS

Foreign corporation, *Sola Basic Industries v. Electric Membership Corp.*, 737.

MINOR

Disaffirmance of contract to purchase car, *Gillis v. Whitley's Discount Auto Sales*, 270.

MIRANDA WARNINGS

Post-arrest silence, *S. v. McGinnis*, 421.

MITIGATING CIRCUMSTANCES

Caution to avoid bodily harm, *S. v. Kornegay*, 579.

Drug use, *S. v. Grier*, 40.

Jealousy, *S. v. Monroe*, 462.

Mental condition, *S. v. Monroe*, 462.

Obtaining medical aid for victim, *S. v. Spears*, 747.

MOTEL

Misrepresentation of condition to purchaser, *Hyde v. Taylor*, 523.

NEW TRIAL

Appeal from interlocutory, *S. v. Howard*, 487.

NOLO CONTENDERE

Withdrawal of, adding case to trial calendar, *S. v. Edwards*, 317.

**NORTH CAROLINA INSURANCE
GUARANTY ASSOCIATION**

Not legal successor of insolvent insurer, *City of Greensboro v. Reserve Insurance Co.*, 651.

NOTICE OF APPEAL

Twelve days after order, *Hardy v. Floyd*, 608.

ORTHODONTIC EXPENSE

Child support, *Boyles v. Boyles*, 415.

OSHA

Probable cause for administrative inspection warrant, *Brooks, Comr. of Labor v. Butler*, 681.

OTHER INSURANCE

Coverage on first policy suspended,
City of Greensboro v. Reserve Insurance Co., 651.

OUTDOOR ADVERTISING SIGN

Revocation of permit for parking on
shoulder of highway, *Ace-Hi, Inc. v.*
Dept. of Transportation, 214.

PARTITION

Sale rather than, *Bomer v. Campbell*,
137.

PAST RECOLLECTION RECORDED

Deposition inadmissible as, *Superior*
Tile v. Rickey Office Equipment, 258.

PAYMENTS

Agreement to make for third party,
Forbes Homes, Inc. v. Trimpi, 614.

PER DIEM BUSINESS EXPENSES

Additional income tax, *Tyson v. Carolina Telephone*, 593.

PHOTOGRAPHIC IDENTIFICATION

Independent origin of in-court identification, *S. v. Lassiter*, 731.

Procedure not impermissibly suggestive, *S. v. Ford*, 244.

PHOTOGRAPHS

Expert testimony not needed for comparison, *Superior Tile v. Rickey Office Equipment*, 258.

PHYSICIAN-PATIENT PRIVILEGE

Waiver by failure to object, *Spencer v. Spencer*, 159.

PICKLE JUICE

Supermarket floor, *France v. Winn-Dixie Supermarket*, 492.

PIPES

Negligence in unloading and chocking,
Broadway v. Blythe Industries, Inc.,
435.

PLUMBERS

Negligence by, no liability by landowners, *Superior Tile v. Rickey Office Equipment*, 258.

PLURIES SUMMONS

Reference to delayed filing of complaint, *Childress v. Forsyth County Hospital Auth.*, 281.

POST-ARREST SILENCE

Impeachment with, *S. v. McGinnis*, 421.

**PREEXISTING SICKNESS
EXCLUSION**

Medical insurance, *McDaniel v. N. C. Mutual Life Ins. Co.*, 490.

PREJUDGMENT INTEREST

Date of damage unknown, *Knott v. Washington Housing Authority*, 95.

PRELIMINARY HEARING

Not required in criminal case, *S. v. Beam*, 181.

PRIOR CRIMES

Good faith basis for impeachment, *S. v. McNair*, 331.

PRIVACY

Corporation's right to, *In re Superior Court Order*, 63.

PROBATION OFFICER

Acquainted with jurors, *S. v. Kornegay*,
579.

PROCESS

Failure to serve order extending time for filing complaint, *Childress v. Forsyth County Hospital Auth.*, 281.

Reference in alias summons to delayed filing of complaint, *Childress v. Forsyth County Hospital Auth.*, 281.

PUMP ASSEMBLY

Injury from failure of hooking ring, *Millikan v. Guilford Mills, Inc.*, 705.

PUNITIVE DAMAGES

Inadequate firewalls not basis for, *Starkey v. Cimarron Apartments; Evans v. Cimarron Apartments*, 772.

No entitlement for breach of licensing agreement, *Marcoin, Inc. v. McDaniel*, 498.

PURCHASE MONEY MORTGAGE

Anti-deficiency statute inapplicable where security released, *Barnaby v. Boardman*, 299.

QUANTUM MERUIT

Fee in domestic relations case, *Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson*, 147.

RAILROADS

Employees jumping from moving train in anticipation of collision, *Southern Railway Co. v. O'Boyle Truck Lines*, 1.

RAPE

Of daughter, *S. v. Lester*, 757.

Use of force, *S. v. Lester*, 757.

REAL ESTATE COMMISSION

Sale by owner, *Lambe-Young, Inc. v. Cook*, 588.

REGISTRATION

Deed of trust before acquisition of title, *Schuman v. Roger Baker and Assoc.*, 313.

RELEASE

By parent corporation binding on subsidiary, *Maintenance Service v. Construction Co.*, 49.

REST HOME PATIENT

Murder of, *S. v. Beam*, 181.

RETALIATORY DISCHARGE

For filing workers' compensation claim, *Henderson v. Traditional Log Homes*, 303.

RETIREMENT CENTER

Not entitled to charitable exemption, *In re Appeal of Barham*, 236.

ROBBERY

Instruction on lesser offense, *S. v. Tarrant and S. v. Davis*, 449.

Intent permanently to deprive owner of property, *S. v. Rawls*, 230; *S. v. Bates*, 477.

Of husband and wife two separate crimes, *S. v. Wheeler*, 191.

Trespass not lesser-included offense, *S. v. Bates*, 477.

ROOF TRUSSES

Collapse of, *Tri City Building Components v. Plyler Construction*, 605.

ROOM AND BOARD FOR COLLEGE STUDENTS

Child support, *Boyles v. Boyles*, 415.

SALES AND USE TAXES

Due diligence in collection, *In re Petition of Jonas*, 116.

SEARCHES AND SEIZURES

Apparently abandoned vehicles, no expectation of privacy, *S. v. McLamb*, 712.

Brush pile, *S. v. Burch*, 444.

Compliance with knock and announce requirements, *S. v. Edwards*, 317.

Envelopes and wallets in car, *S. v. Hopkins*, 530.

Execution of warrant at night, *S. v. Edwards*, 317.

Informant's affidavit, *S. v. Craver*, 555.

Probable cause for administrative inspection warrant, *Brooks, Comr. of Labor v. Butler*, 681.

Probable cause to search vehicle, *S. v. Ford*, 244.

Warrant for tract of land, search of vehicle not on tract, *S. v. McLamb*, 712.

SECOND MORTGAGE

Anti-deficiency judgment statute, *Blanton v. Sisk*, 70.

SENTENCING

Absence of proper hearing, *S. v. McRae*, 779.

SEPARATION AGREEMENT

Modification of alimony provisions, *Acosta v. Clark*, 111.

No substantial failure to perform alimony agreement, *Cator v. Cator*, 719.

SEQUESTRATION OF WITNESSES

Failure to include pretrial order in record, *Spencer v. Spencer*, 159.

SHOE PRINTS

Non-expert opinion admissible, *S. v. Edmondson*, 426.

SHOWUP IDENTIFICATION

No likelihood of misidentification, *S. v. McNair*, 331.

SOLICITATION TO COMMIT MURDER

Felony triable in superior court, *S. v. Triplett*, 341.

SPEEDY TRIAL

Delay between original indictment and trial, *S. v. Smith*, 293.

Insufficient findings for dismissal without prejudice, *S. v. Smith*, 293.

More than 120 days between mistrial and motion for dismissal, *S. v. Jones*, 467.

STATE EMPLOYEE

Trainee not entitled to due process in dismissal, *Yow v. Alexander Co. Dept. of Soc. Serv.*, 174.

STATUTE OF LIMITATIONS

Lease under seal, property transferred, *Murphrey v. Winslow*, 10.

Wrongful death, *Walker v. Santos*, 623.

STATUTE OF REPOSE

Lift truck, *Davis v. Mobilift Equipment Co.*, 621.

STEEL COIL EMBOLIZATION

Appeal of summary judgment on informed consent claim, *Estrada v. Jaques*, 627.

Relation back of amendment to complaint, *Estrada v. Jaques*, 627.

STOCKBROKERS

Erroneous inside information, *Skinner v. E. F. Hutton & Co.*, 517.

STOLEN CARS

Disassembled parts, *S. v. Craver*, 555.

SUBSIDIARY CORPORATION

Release by parent binding, *Maintenance Service v. Construction Co.*, 49.

SUMMARY JUDGMENT

Affidavit filed on day of hearing, *Gillis v. Whitley's Discount Auto Sales*, 270.

Denial of continuance, hearing conducted by associate counsel, *Gillis v. Whitley's Discount Auto Sales*, 270.

Ten days' notice of hearing, *Tri City Building Components v. Plyler Construction*, 605.

SUMMONS

Failure to serve order extending time for filing complaint, *Childress v. Forsyth County Hospital Auth.*, 281.

SURGEONS

Whether obtained informed consent to embolization procedure, *Estrada v. Jaques*, 627.

TANKER TRUCK

Near miss by train, *Southern Railway Co. v. O'Boyle Truck Lines*, 1.

TAX LIEN

Insufficient notice of sale, *Howell v. Treece*, 322.

TAX RETURNS

Production of as condition for collection of insurance, *Lee v. State Farm Fire and Casualty Co.*, 575.

TEMPORARY ORDER

Continuance of, necessity for specific findings, *Spencer v. Spencer*, 159.

TEMPORARY WORKERS

Dual employment for workers' compensation, *Henderson v. Manpower*, 408.

TENNESSEE AUTHORITIES

Confession induced by, *S. v. Richardson*, 509.

TERMINATION OF PARENTAL RIGHTS

Child neglect, *In re Johnson*, 283.
Malnutrition, *In re Webb*, 345.

TRAINEE

No entitlement to due process in dismissal, *Yow v. Alexander Co. Dept. of Soc. Serv.*, 174.

TRESPASS

Not lesser included offense of robbery, *S. v. Bates*, 477.

TRIAL CALENDAR

Adding case to after withdrawal of no contest plea, *S. v. Edwards*, 317.

TRUSTS

Constructive fraud, mental incapacity, and undue influence, *Stilwell v. Walden*, 543.

UNCONSCIOUSNESS

Refusal to instruct on, *S. v. Snyder*, 335.

UNEMPLOYMENT COMPENSATION

Leaving work between notice of discharge and formal discharge, *Bunn v. N. C. State University*, 699.

Resignation due to travel, *In re Hugins v. Precision Concrete Forming*, 571.

UNFAIR TRADE PRACTICES

Benefit of bargain rule for damages, *Strickland v. A & C Mobile Homes*, 768.

Employment of bookkeeper through employment agency, *Winston Realty Co. v. G.H.G., Inc.*, 374.

Fixing insurance rates, *Phillips v. Integon Corp.*, 440.

UNFAIR TRADE PRACTICES**— Continued**

Misrepresentation during sale of mobile home, *Strickland v. A & C Mobile Homes*, 768.

Right to cancel installation of siding and windows, *Eastern Roofing and Aluminum Co. v. Brock*, 431.

VENUE

Action against executor, *DesMarais v. Dimmette*, 134.

Order denying change of appealable, *DesMarais v. Dimmette*, 134.

VIDEOTAPES

Of experimental evidence, *Short v. General Motors Corp.*, 454.

VISITATION RIGHTS

Reduction of child support to enforce, *Mather v. Mather*, 106.

WALL

Defective design and construction of, *Square D Co. v. C. J. Kern Contractors*, 30.

WITNESS

Conversation with juror, *S. v. Rutherford*, 674.

WORKERS' COMPENSATION

Accident while maintaining airplane, *Pollock v. Reeves Bros., Inc.*, 199.

Blackouts and dizziness not work related, *Mebane v. General Electric Co.*, 752.

Dual employment, *Henderson v. Manpower*, 408.

Fistula caused by airline flight, *Smith v. DHL Corp.*, 124.

Retaliatory discharge, *Henderson v. Traditional Log Homes*, 303.

WRONGFUL DEATH

Statute of limitations, *Walker v. Santos*, 623.

YOUTHFUL OFFENDER

Failure to make no benefit finding, *S. v. McRae*, 779.

ZONING ORDINANCE

Failure to follow procedures, *Town of Kenansville v. Summerrin*, 601.

Second building on single lot, *Town of Kenansville v. Summerrin*, 601.

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